DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-529
Title: Virginia Office for Protection and Advocacy, Petitioner
v.
James W. Stewart, III, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et al.
Docketed: November 2, 2009
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (08-1845)
Decision Date: June 2, 2009
Rehearing Denied: July 30, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 28 2009	Petition for a writ of certiorari filed. (Response due December 2, 2009)
Nov 5 2009	Order extending time to file response to petition to and including December 28, 2009.
Dec 2 2009	Brief amici curiae of Law Professors filed.
Dec 2 2009	Brief amicus curiae of New Jersey Public Advocate filed.
Dec 18 2009	Brief of respondents James S. Reinhard, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et al. in opposition filed.
Dec 29 2009	Reply of petitioner Virginia Office for Protection and Advocacy filed. (Distributed)
Dec 30 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 21 2010	Brief amicus curiae of United States filed.
May 27 2010	Supplemental brief of respondents James S. Reinhard, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et al. filed.
Jun 1 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 21 2010	Petition GRANTED.
Jul 9 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 19, 2010.
Jul 9 2010	The time within which to file respondents' brief on the merits is extended to and including October 4, 2010.
Aug 17 2010	Further extension of time to file the joint appendix and petitioner's brief on the merits to and including August 24, 2010.
Aug 17 2010	Further extension of time within which to file respondents' brief on the merits to and including October 14, 2010.
Aug 24 2010	Brief of petitioner Virginia Office for Protection and Advocacy filed.
Aug 24 2010	Joint appendix filed. (Statement of costs filed)
Aug 31 2010	Brief amicus curiae of United States filed.
Aug 31 2010	Brief amici curiae of AARP, et al. filed.
Aug 31 2010	Brief amicus curiae of National Disability Rights Network filed.
Aug 31 2010	Brief amici curiae of Law Professors filed.
Aug 31 2010	Brief amicus curiae of Rhode Island Office of the Child Advocate filed.
Sep 7 2010	SET FOR ARGUMENT ON Wednesday, December 1, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 24 2010	Record received from U.S.C.A. for 4th Circuit.
Sep 27 2010	Record received from U.S.D.C. for Eastern District of Virginia.
Oct 7 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 8 2010	CIRCULATED
Oct 14 2010	Brief of respondents James W. Stewart, III, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et al. filed. (Distributed)
Oct 21 2010	Brief amici curiae of Indiana, et al. filed. (Distributed)
Nov 1 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Nov 15 2010	Reply of petitioner Virginia Office for Protection and Advocacy filed. (Distributed)
Dec 1 2010	Argued. For petitioner: Seth M. Galanter, Washington, D. C., and Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Earle Duncan Getchell, Jr. Solicitor General, Richmond, Va.

PETITION FOR WRIT OF CERTIORARI

FILED
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OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER,

v.

JAMES S. REINHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND CHARLES M. DAVIS, IN HIS OFFICIAL CAPACITY AS DIRECTOR, CENTRAL STATE HOSPITAL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Virginia, by its Office for Protection and Advocacy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit (App., *infra*, 1a-29a) is reported at 568 F.3d 110. The decision of the district court (App., *infra*, 30a-46a) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on June 2, 2009. Petitioner timely filed a petition for rehearing and rehearing en banc. The Fourth Circuit denied the petition on July 30, 2009.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The relevant portions of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.*, and the Virginia statutes are set forth at App., *infra*, 49a-81a.

INTRODUCTION

This case involves the ability of federal courts to assure prospective compliance with federal statutes designed to protect individuals with disabilities and mental illness from abuse and neglect.

Two federal statutes provide federal funding to States to establish entities—either independent state agencies or private non-profit corporations—that possess various powers intended to detect abuse and neglect, including the right of access to certain medical records. Virginia elected to participate in these federal programs and designated petitioner, an independent state agency, to serve as its Protection and Advocacy System.

In this lawsuit, petitioner is seeking records relevant to its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of state-run institutions. Petitioner alleged that the respondent state officials are denying it access to the records in violation of federal law and sought prospective relief.

The court of appeals held that this suit was barred by the Eleventh Amendment, and did not fall

within the *Ex parte Young* doctrine, simply because the plaintiff was a state agency. In doing so, the court below created or enlarged several splits in the circuits and has drawn into question the availability of adequate federal remedies for petitioner and a host of similarly situated entities seeking to enforce federal law. The court of appeals' rationale is not based on the history or purpose of *Ex parte Young* and, in fact, disregards that doctrine's core function of making a federal forum available to assure that state officials comply with the Supremacy Clause. The United States as amicus urged the court below to grant rehearing en banc to reverse the decision because of its legal errors and adverse effect on effectiveness of the federal programs, but the court of appeals disregarded the views of the United States.

STATEMENT OF THE CASE

A. Statutory Framework

1. ***Federal Statutes.*** In response to public reports of deplorable conditions at a New York state institution for persons with mental retardation in the 1970s, Congress enacted legislation creating a federal grant program that paid States to establish Protection and Advocacy Systems that would be dedicated to protecting individuals with disabilities from abuse and neglect. *See* Developmental Disabilities Assistance and Bill of Rights Act (DD Act), Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 *et seq.*); S. Rep. No.

93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6408-6409.

In the 1980s, Congress enacted a similar statute to fund Protection and Advocacy Systems focused on protecting individuals with mental illness. *See* Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 *et seq.*). In express statutory findings, Congress determined that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing "State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a)(1), (a)(4). Congress made clear that it intended the federal funds to assist States in establishing Protection and Advocacy Systems that could engage in "activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.* § 10801(b)(2)(A).

Every State accepts federal funds under these statutes and each State has established a Protection and Advocacy System.

Congress intended that a Protection and Advocacy System be independent of the State, but Congress gave States flexibility as to how to achieve that goal. Under both federal statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that

the Systems "shall * * * be independent of" any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2). While a State is free to establish a Protection and Advocacy System either as a "private non-profit entity" or as a state entity, *id.* §§ 15044(a), 10805(c)(1)(B), in either situation, the Governor may appoint no more than one-third of any governing board of a System. *Id.* § 15044(a)(2). Virginia and seven other States have established independent state agencies,[1] while the remaining forty-two States have opted for not-for-profit corporations.

Once a State establishes a System as either a private non-profit or state entity, it cannot change the nature of the System from private to public (or vice versa) absent "good cause," *id.* § 15043(a)(4)(A), and any such change can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v. Department of Health & Human Servs.*, 997 F.2d 1290, 1292 (9th Cir. 1993).

Congress provided additional federal protections for, and oversight of, Protection and Advocacy Systems. States are prohibited from imposing "hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent

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[1] *See* Conn. Gen. Stat. § 46a-7 *et seq.*; Ind. Code § 12-28-1-1 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq*. Alabama's system is established by unpublished Governor's directive.

that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system." 42 U.S.C. § 15043(a)(2)(K). Protection and Advocacy Systems are subject to federal onsite review, *id.* § 15044(d), and are required to submit annual reports to the federal government, *id.* §§ 10805(a)(7), 15044(e).

In addition to authorizing advocacy on behalf of individuals, both statutes anticipate a separate protection role for the system by expressly providing that a Protection and Advocacy System, "shall * * * have access" to patient records and treatment facilities, *id.* §§ 15043(a)(2)(I), (c), 10805(a)(3), (4), and shall have authority to pursue "administrative, legal, and other appropriate remedies" to ensure the protection of individuals with disabilities or mental illness who are receiving care or treatment in the State, *id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B). This federal right to access records is *not* contingent on state law. To the contrary, since 1988, the System has been entitled to records even if "the laws of a State prohibit an eligible system from obtaining access to the records." *Id.* § 10806(b)(2)(C); *see also id.* § 10806(a) (providing that System may disclose certain records required to be maintained as confidential under state law).

2. ***Virginia Law.*** Virginia established petitioner VOPA in 2002 as an "independent state

agency." Va. Code § 51.5-39.2A.[2] That independence is reflected in several provisions.

First, VOPA's governing board consists of eleven "nonlegislative citizen members," only three of whom are appointed by the Governor. Va. Code § 51.5-39.2B. The remaining eight members are appointed by the legislative branch (five by the Speaker of the House of Delegates and three by the Senate Committee on Rules). *Ibid.* VOPA itself nominates board members and, although the appointing authorities are not limited to these nominees, they "shall seriously consider the persons nominated and appoint such persons whenever feasible." *Ibid.* Members of the board serve for fixed terms and may be removed only through a judicial proceeding and only for good cause. *See id.* § 51.5-39.2F (incorporating § 24.2-230 *et seq.*).

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[2] VOPA is listed in the category of "Independent Agencies," which "do not operate in the Executive, Judicial, or Legislative Branches of Virginia." http://www.virginia.gov/cmsportal3/government_4096/branches_of_state_government_4097. VOPA's predecessor agency was the Department for Rights of Virginians with Disabilities, for which the Virginia Secretary of Health and Human Services was responsible. Va. Code §§ 2.1-51.15 (as amended), 51.5-36 through 51.5-39 (repealed). In carrying out this redesignation process, the Governor was required to, and did, "submit an assurance to the Assistant Secretary [of the Department of Health and Human Services] that the newly designated Protection and Advocacy agency meets the requirements of the statute and the regulations." 45 C.F.R. § 1386.20; 2002 Va. Acts c. 572, cl. 4.

Second, "[n]otwithstanding any other provision of law," petitioner is "independent of the Office of the Attorney General," which is run by an elected official. Va. Code § 51.5-39.2A. VOPA possesses the authority "to employ and contract with legal counsel * * * to initiate actions on behalf of [VOPA] * * * in any matter, including state, federal and administrative proceedings." *Ibid.* VOPA is virtually unique among Virginia state agencies in its authority to retain its own legal counsel without permission from the Attorney General. *See* Va. Code § 2.2-510.

Third, VOPA's finances are independent. VOPA's Board administers "a special nonreverting fund to be known as the Protection and Advocacy Fund," Va. Code § 51.5-39.5B. "Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the [State's] general fund but shall remain in the Fund." *Ibid.* VOPA may "apply for and accept, gifts, donations, grants, and bequests * * * from the United States government * * * and from any other source and [may] deposit all moneys received in the Protection and Advocacy Fund." *Ibid.* To these ends, VOPA "shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient or desirable." *Ibid.* The State, by contrast, may not reduce the funds it dedicates to VOPA based on the presence of federal funds. 42 U.S.C. § 15043(a)(2)(M).

VOPA is authorized to "access records of facilities [and] institutions * * * that provide care or treatment to individuals with disabilities regarding the

commitment, care, treatment, and habilitation of such individuals, unless the disclosure of such records is specifically prohibited by federal law." Va. Code § 51.5-39.4(4). The state law provides, however, that "there shall be no right of access to privileged communications pursuant to § 8.01-581.17," involving certain medical reports generated by peer review committees. *Ibid.* VOPA is further authorized to "initiate any proceedings to secure the rights" of persons with disabilities. *Id.* § 51.5-39.2(A).

B. Factual Background

This case arises from petitioner VOPA's attempt to investigate the deaths of two individuals and injuries to a third, that occurred while the individuals were residents of institutions operated by the Commonwealth of Virginia. The facts discussed below are drawn from petitioner's complaint and its motion for a preliminary injunction.

Resident A. The first of these individuals, "Resident A," suffered from mental illness and retardation and died while a resident of Central Virginia Training Center (CVTC), which respondent Micheletti runs under the supervision of respondent Reinhard, as Commissioner of the Department of Behavioral Health and Developmental Services.

Resident A had a decades-long history at CVTC of ingesting non-edible items. After exhibiting symptoms of bowel obstruction, Resident A was transported to a community hospital for surgical removal

of two latex gloves from his intestines. Resident A died eight days after the surgery.

VOPA initiated an investigation to determine whether Resident A's death resulted from abuse or neglect. As part of this investigation, VOPA repeatedly requested copies of certain reviews conducted by CVTC in conjunction with Resident A's death. CVTC acknowledged VOPA's requests, but failed to provide the reviews.

Resident B. "Resident B," an individual with mental retardation, was assaulted at CVTC by another resident and was observed by CVTC staff covered in blood. A CVTC staff member found multiple pieces of human ear tissue and a large amount of blood on the floor in Resident B's room.

VOPA initiated an investigation to determine whether Resident B's injuries resulted from abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CVTC concerning Resident B's injuries, but CVTC refused to provide them.

Resident C. The second death was of an individual with mental illness, "Resident C," who was a patient at Central State Hospital (CSH), which respondent Davis runs under the supervision of respondent Reinhard.

Resident C complained of being unable to breathe when CSH staff attempted to place him in restraints. During this restraint incident, efforts to revive Resident C became necessary, but failed. Resident C

was transported to a community hospital and was pronounced dead.

VOPA initiated an investigation to determine whether the death was the result of abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CSH relating to the death of Resident C, but its requests were rebuffed on grounds of peer review privilege.

C. Proceedings Below

1. Petitioner VOPA filed this action against respondent state officials in the United States District Court for the Eastern District of Virginia seeking a preliminary and permanent injunction to provide the requested records and declaratory judgment that respondents were violating federal law in refusing to provide the records.

2. The district court denied respondents' motion to dismiss, which was based on failure to state a claim and Eleventh Amendment immunity. App., *infra*, 30a-46a.

The district court held that petitioner had stated a claim because it alleged that respondents refused to provide records that are required to be provided to petitioner under federal law. App., *infra*, 34a. The court concluded that respondents' reliances on the state law barring the release of records involving peer review privilege (and the question whether it was preempted) was an affirmative defense to the merits

of the complaint that was not appropriate for resolution at that time. *Id.* at 35a.

The district court also rejected respondents' reliance on the Eleventh Amendment. The court first concluded that respondents had not waived their immunity by accepting federal financial assistance under a statute that clearly contemplated litigation between petitioner and other state agencies. App., *infra*, 39a-40a.[3] But the court held that the action could proceed against respondents under *Ex parte Young*.

The court concluded that petitioner met the "predicate for the application of *Ex parte Young*," in that it sued "officials in their official capacities," and not the state entities themselves. *Id.* at 40a. Further, the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 41a (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). This was because respondents "continue to refuse to provide records" as required by federal law and petitioner sought "an injunction that [respondents] prospectively release the records." *Id.* at 41a-42a.

The district court rejected the claim that the action presented "special sovereignty interests" that "trump[ed]" *Ex parte Young*. *Id.* at 43a. The court

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[3] The court of appeals affirmed that holding, App., *infra*, 10a-13a, and petitioner does not seek further review of it.

held that there was "no decision which supports" respondents' "broad rule" that the Eleventh Amendment requires a federal court to "refrain from deciding any cases brought by a state agency against another state agency." *Id.* at 45a.

Instead, the court reasoned, it is "the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests." *Id.* at 45a. This case does not concern disputes between a State and a political subdivision regarding "internal budgetary arrangements" that, the district court noted, had been an area in which the federal courts had avoided involvement. *Id.* at 43a. Adjudicating this alleged violation of federal law "does not interfere with the prerogative of the State." *Id.* at 44a.

3. Respondents filed an interlocutory appeal to challenge the denial of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The court of appeals reversed and remanded with instructions to dismiss the action. App., *infra*, 1a-29a.

The court of appeals held that despite its "superficial appeal," *Ex parte Young* was not available because petitioner was a state agency. *Id.* at 14a. The court of appeals relied on (1) the absence of any historical evidence that such suits had been previously permitted, *id.* at 14a-16a; (2) "sovereign interests and federalism concerns" as reflected in

cases such as *Coeur d'Alene*, *Alden v. Maine*, and *Pennhurst*, *id.* at 16a-20a; and (3) Supreme Court cases refusing to give relief to political subdivisions that sued States for alleged constitutional violations, *id.* at 21a-24a.

4. Petitioner filed a petition for rehearing en banc. The United States filed an amicus brief in support of that petition. App., *infra*, at 82a-98a. The court of appeals denied rehearing en banc. *Id.* at 47a-48a.

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' PER SE RULE EXCLUDING A CLASS OF PLAINTIFFS FROM INVOKING *EX PARTE YOUNG* DEPRIVES THOSE PLAINTIFFS OF NEEDED REMEDIES, CREATES A SPLIT IN THE CIRCUITS, AND IS CONTRARY TO THE SUPREMACY CLAUSE INTERESTS UNDERLYING *EX PARTE YOUNG*

In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that the Eleventh Amendment did not bar a suit in federal court for injunctive relief claiming that a state official violated federal law. The doctrine of *Ex parte Young* encapsulated a century's worth of American jurisprudence and reflected an English tradition extending back many centuries more. Given the breadth and depth of the state sovereignty principle within our federalist system, the doctrine of *Ex parte Young* was "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v.*

Halderman, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

The Fourth Circuit has adopted a per se rule that, because petitioner is a state agency, the Eleventh Amendment allows only a state court to adjudicate whether petitioner's federal statutory rights were violated by state officials. This is so even though (1) petitioner stated a claim that respondents' policy of refusing to provide certain documents was preempted by federal law, by force of the Supremacy Clause, App., *infra*, 6a; Resp. C.A. Opening Br. 8 nn.9 & 10; (2) Congress granted jurisdiction to the federal district courts to hear all questions arising under federal law, including such Supremacy Clause claims, 28 U.S.C. § 1331; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); Resp. C.A. Opening Br. 3; and (3) petitioner's claim falls squarely within the accepted scope of *Ex parte Young*, in that it seeks declaratory and injunctive relief to remedy an ongoing violation of federal law.

Indeed, respondents admitted, and the court below agreed, that if the party that brought this suit had been chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. App., *infra*, 16a-17a; Resp. C.A. Opening Br. 26 ("If VOPA were a non-profit entity rather than a state entity, there would be no sovereign immunity issue.").

The Fourth Circuit erred in holding that petitioner's status as a state agency forecloses this

Ex parte Young suit. It blended an amalgam of inapposite doctrines and placed them, incorrectly, under the aegis of the Eleventh Amendment. In fact, there is nothing in the text, history, or purpose of the Eleventh Amendment that bars this suit.

In holding otherwise, the Fourth Circuit has undermined an important remedial mechanism to vindicate federal law that Congress intended to be available to petitioner and many other independent state agencies that advocate on behalf of classes of persons unable to advocate for themselves, has created a split with other courts of appeals about the method for determining when *Ex parte Young* is appropriately invoked, and has disregarded the Supremacy Clause interest underlying that doctrine. As the United States explained below, the court of appeals' decision "threatens to undermine the enforcement of federal laws designed to protect the health and safety of individuals with developmental disabilities or mental illness." App., *infra*, 89a.

A. The Court Of Appeals' Decision Creates A Split Regarding *Ex parte Young* And Does So In Reliance On One Side Of A Long-standing Split Regarding When A State-Created Entity May Sue Its Creator

The Eleventh Amendment provides no basis for a federal court to refuse to hear this case. By holding that the Eleventh Amendment requires this case involving a federal claim against state officials to be heard only in state court, the court below creates an

inter-circuit split, exacerbates another existing conflict, and departs from a consistent practice of federal courts hearing suits brought by state entity Protection and Advocacy Systems.

1. The Fourth Circuit's reliance on Coeur d'Alene *to determine whether the Eleventh Amendment bars this action brings it into conflict with every other circuit*

a. By looking to the characteristics of the plaintiff, rather than the nature of the defendant and the relief sought, the Fourth Circuit brought itself into conflict with the way all other courts have determined when an action against state officials is barred by the Eleventh Amendment.

The Fourth Circuit created a conflict by relying on the "special sovereignty interests" analysis of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to hold that the Eleventh Amendment barred this action. Other courts of appeals have consistently refused to rely on an interest analysis in determining whether to hear an *Ex parte Young* action, and have confined *Coeur d'Alene* to actions brought against state officials to challenge state regulatory jurisdiction over real property.

In *Coeur d'Alene*, five Justices, in opinions reflecting two different rationales, held that, under the "particular and special circumstances" of that case, *Ex parte Young* was not available when "the declaratory and injunctive relief the [Indian] Tribe

seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." 521 U.S. at 287, 282. The lead opinion, authored by Justice Kennedy but joined in whole only by Chief Justice Rehnquist, would have applied a "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," including consideration of whether there was a "prompt and effective remedy in a state forum." *Id.* at 278, 274. A concurring opinion authored by Justice O'Connor, and joined by Justices Scalia and Thomas, rejected that approach, *id.* at 291-296, as did the dissenting opinion of four Justices.

After *Coeur d'Alene*, this Court rejected the balancing approach urged by the plurality in that case. In *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court held that *Ex parte Young* required only a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)). *Verizon* reversed a Fourth Circuit decision which held that the Eleventh Amendment barred an *Ex parte Young* action against state officials because "of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State

officials." *Bell Atlantic Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 295 (4th Cir. 2001).

Particularly in light of this Court's decision in *Verizon*, all the other courts of appeals to have reached the question have uniformly read *Coeur d'Alene* to hold *only* that a remedy that would divest a State of title to, or regulatory jurisdiction over, real property is equivalent to a forbidden monetary remedy and thus beyond the scope of *Ex parte Young*. Outside that narrow compass, courts of appeals have refused to apply the "special sovereignty interest" exception of *Coeur d'Alene* to bar any other type of suit. *See, e.g., Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) ("we cannot extend *Coeur d'Alene* beyond its 'particular and special circumstances,' which involved the protection of a State's land") (citation omitted); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (limiting *Coeur d'Alene* to cases where "strong governmental land interests" are present); *Dubuc v. Michigan Bd. of Law Exam'rs*, 342 F.3d 610, 617 (6th Cir. 2003) ("Googasian's and Berry's reliance on *Coeur d'Alene* is unavailing because the present lawsuit is not the functional equivalent of a quiet title action that implicates a state's sovereign interest in its lands or waters.").

The Tenth Circuit had, for a time, taken a broader view of *Coeur d'Alene*. But, after *Verizon*, the Tenth Circuit acknowledged that it had previously "misconstrued" *Coeur d'Alene* to require "federal courts [to] examine whether the relief sought against

a state official implicates special sovereignty interests," and that *Verizon* clarified that "the courts of appeals need not (and should not) linger over the question whether 'special' or other sorts of sovereign interests are at stake" in applying *Ex parte Young*. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (quoting *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007), *certs. denied*, 128 S. Ct. 873, 884 (2008)) (some internal quotation marks omitted).

b. Further, this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999), decided two years after *Coeur d'Alene*, suggests that *Coeur d'Alene* may no longer be a proper application of the Eleventh Amendment.

In *Coeur d'Alene*, the plurality opinion reasoned that the Eleventh Amendment barred an *Ex parte Young* suit in federal court because a state court could hear the plaintiffs' federal claims. In *Alden*, however, the Court held, for the first time, that the constitutional protections of state sovereign immunity reflected in the Eleventh Amendment apply to suits claiming violations of federal law brought in state court. The Court held that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum." 527 U.S. at 749.

If, indeed, compelling state courts to adjudicate federal claims against States is *more* constitutionally

offensive than compelling federal courts to hear such suits, then it is not clear why the Eleventh Amendment would favor, as in *Coeur d'Alene* and this case, an *Ex parte Young* action in state court over an *Ex parte Young* action in federal court. Thus, after *Alden*, there appears to be no reason why the rule of *Ex parte Young* should be applied differently in state and federal courts. Certainly, it should not require state courts to be open to federal claims when federal courts are closed.

In any event, there was no state forum in which full relief was available. Here, as discussed below, the one proceeding identified by the court of appeals and respondents—an original action for mandamus in the Virginia Supreme Court—would be inadequate because, *inter alia*, it could not provide any interim or declaratory relief. *See* pages 26-27, *infra*.

2. The Fourth Circuit's decision relies on one side of a circuit split regarding the ability of state-created entities, other than private corporations, to sue the State

The Fourth Circuit relied on a line of century-old cases, none of which involved Eleventh Amendment immunity, for the proposition that suits by political subdivisions against the States that created them are prohibited. App., *infra*, 22a (citing *Williams v. Mayor of Balt.*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Stewart v. City of Kansas City*, 239 U.S. 14 (1915); *Hunter v. City of Pittsburgh*, 207 U.S. 16 (1907)).

In adopting a reading of those case, the Fourth Circuit selected one side of a longstanding split on whether state-created entities, other than private corporations, can sue the State that chartered them for violations of the Constitution or federal law.

Justice White noted almost 30 years ago that the courts of appeals are split on the proper meaning to give those cases. *See City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from the denial of certiorari). The situation has not improved since that time.

1. Some courts of appeals have adopted a per se rule that public entities cannot sue the States that created them for alleged violations of their *constitutional* rights. *See ibid.*[4] Even if the *Williams/Trenton*

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[4] That is so even though this Court has explained that the "correct reading" of those cases is that a "State's authority [was] unrestrained by the particular prohibitions of the Constitution considered in those cases." *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960). Those cases should thus have no relevance to the question of whether a public entity *may* sue a State for violations of the Constitution, as they simply go to the question of whether a public entity will prevail on its claim.

That explanation is consistent with a line of this Court's cases adjudicating constitutional claims brought by public entities against States on the merits and rejecting Eleventh Amendment and lack-of-standing arguments. *See, e.g., Papasan v. Allain*, 478 U.S. 265 (1986) (holding that plaintiffs, including school board superintendent, could rely on *Ex parte Young* to bring federal constitutional claim against state official); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968)

(Continued on following page)

line of cases established a prohibition against public entities raising constitutional challenges against the States that created them, such a prohibition should have no bearing on petitioner's suit, which seeks enforcement of a federal statute by an independent state agency.

2. The Ninth Circuit, however, has extended that per se rule and held that public entities cannot sue the States that created them for alleged violations of *federal statutes*. *See, e.g.*, *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000). The Fourth Circuit in this case seems to embrace that proposition.

3. At least three other courts of appeals have reached a conclusion contrary to that of the Ninth Circuit, permitting public entities to sue state officials to enforce federal statutes, as in this case. *See Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 nn.3 & 5 (3d Cir. 1984); *Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998) (agreeing with *Rogers* that "[n]either the *Williams/Trenton* line of cases nor any other subsequent Supreme Court case has held that a political

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(school board officials have standing to sue state officials); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982) (holding school district was entitled to attorneys' fees for prevailing on federal constitutional claim against state official).

subdivision is barred from asserting the structural protections of the Supremacy Clause of Article VI in a suit against its creating state"), *cert. denied*, 526 U.S. 1068 (1999).

Indeed, in *Allegheny County*, the Third Circuit held that the suit against state officials by a state-created public agency could proceed under *Ex parte Young*, the exact opposite holding of the decision below. "[T]he Eleventh Amendment is not a bar to all prospective relief against the state officials if violations of federal law are established." 732 F.2d at 1174.

3. *The Fourth Circuit's decision is contrary to the practice of other courts that have heard suits brought by state entity Protection and Advocacy Systems*

Until the Fourth Circuit's decision in this case, the federal courts have uniformly adjudicated suits brought by Protection and Advocacy Systems against state officials. As the United States explained, and as respondents do not dispute, "other courts of appeals consistently have allowed suit by [Protection and Advocacy] systems to proceed in federal court without regard to whether the system was a state agency or a private non-profit." App., *infra*, 85a; *see, e.g., Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 97 F.3d 492 (11th Cir. 1996) (state system); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.)

(state system); *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006) (non-profit system).

After the decision in this case, the Seventh Circuit followed the Fourth Circuit in holding that a suit by a state entity Protection and Advocacy System was barred by the Eleventh Amendment. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548, 552-553 (7th Cir. 2009). That holding just deepens the split in the circuits.[5]

B. The Decision Below Deprives Petitioner Of A Critical Means Of Enforcing Its Federal Rights, A Means Also Relied On By Many Other State Agencies And Political Subdivisions

1. The ability to obtain a federal forum, and take advantage of the broad equitable authority of the federal courts, is critical to the mission of petitioner and other state agency Protection and Advocacy Systems. In many of the States where the Protection and Advocacy Systems are state agencies, the federal courts offer numerous structural

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[5] A petition for rehearing is pending in the Seventh Circuit case. But there is no reason to wait to see what the Seventh Circuit does. Even if rehearing is granted and the Seventh Circuit switches sides, the Fourth Circuit's decision will still be contrary to that of numerous other circuits.

advantages that reinforce their ability to vindicate federal rights more effectively.

In general, federal courts have a broader geographic jurisdiction than state trial courts. A Protection and Advocacy System can thus bring a single suit in federal court to resolve a number of violations, each of which could be local, but that could be pursuant to statewide policy or have statewide effect. In state court, a Protection and Advocacy System would have to file multiple suits across the State to get a rule established. For example, in Ohio, each of the 88 counties has its own trial court of general jurisdiction; Alabama has 41 separate circuit courts; even a sparsely populated State like North Dakota has 7 judicial districts.

Further, in some States, state courts are structured to provide procedural advantages to state defendants. Thus, for example, in New York, a state agency obtains an automatic stay of an injunction simply by filing a notice of appeal. *See* N.Y. Civ. Practice Law & R. § 5519(a)(1).

Although the Fourth Circuit held that sovereign immunity would not prevent petitioner from bringing its claim against respondents through an original action for mandamus in the Virginia Supreme Court, App., *infra*, 25a, the court failed to recognize the limitations of that forum. Under Virginia law, the availability of the "extraordinary remedy" of mandamus is contingent on "judicial discretion." *Umstattd v. Centex Homes, G.P.*, 650 S.E.2d 527, 530

(Va. 2007). Further, if there are any fact disputes, there appears to be no mechanism for factfinding in an original proceeding. *See Stroobants v. Fugate*, 163 S.E.2d 192, 194 (Va. 1968). Writs of mandamus also generally do not have the flexibility of equitable remedies. Interim relief is not available. Thus, for example, the order issued by the district court enjoining respondents from destroying or altering the documents sought by petitioner pending resolution of the action, Dt. Ct. Dkt. No. 16, would not be available to the Virginia Supreme Court under its mandamus authority. Nor would the Virginia Supreme Court be able to grant the declaratory judgment sought by petitioner.

2. The Fourth Circuit's holding has implications beyond petitioner and beyond the federal statutes that petitioner enforces. States increasingly rely on independent government agencies charged with the responsibility of monitoring the conduct of other government officials to protect vulnerable citizens and enforce federal rights.

In addition to the Protection and Advocacy Systems that have been established in each State to protect people with disabilities and mental illness, Congress has encouraged States to establish independent agencies to protect other populations, including through litigation.

Thus, Congress has conditioned receipt of certain federal funds on a State's creation of an "Office of the State Long-Term Care Ombudsman" to assist people

residing in nursing homes and other institutions. 42 U.S.C. § 3058g. States must ensure that the Ombudsmen have "adequate legal counsel" to "assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman." *Id.* § 3058g(g)(1)(A). And the Ombudsmen may "seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents." *Id.* § 3058g(g)(2).

Even without federal encouragement, States have in a variety of settings adopted the view that permitting state agencies to litigate against other state agencies is an effective means of assuring that the public interest is served. Thus, many States have created independent agencies that advocate on behalf of consumers in front of state and federal rate-setting agencies. Other States have adopted special agencies that can sue governments to further the interests of children. A decade ago, an American Bar Association report documented that "[m]ore than 25 child welfare ombudsman programs exist in the United States today." American Bar Ass'n, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* 11 (1998), *available at* http://www.ncjrs.gov/pdffiles/164727.pdf. The report concluded that the "most powerful tool of [the ombudsman] is the ability to bring legal action to safeguard the rights of children." *Id.* at 12.

In New Jersey, the State has created an entire department that is intended to ensure through advocacy and litigation that other state and local

agencies do not violate the rights of their citizens. *See* N.J. Stat. Ann. § 52:27EE-59 (authorizing "instituting litigation on behalf of a broad public interest"); *see also id.* § 52:27EE-12 (defining "public interest" to mean "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens").

The Fourth Circuit's per se rule would exclude all these entities from suing state officials in federal court, even though their regulations clearly contemplate adversarial proceedings against a traditionally structured state agency, and even if they were seeking to enforce federal law. The United States thus correctly informed the court below that its decision "compromises vital federal protections for especially vulnerable individuals." App., *infra*, 85a.

C. The Fourth Circuit Disregarded The Federal Courts' Interest In The Supremacy Clause When It Arbitrarily Limited *Ex parte Young*

The Fourth Circuit's holding disregarded the foundations of *Ex parte Young*. In the past century, this Court has linked the *Ex parte Young* doctrine to the Supremacy Clause and the need to provide a federal forum for the vindication of federal rights. "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a

continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). As the United States explained, the court of appeals' decision "overlooks the historical rationale for the *Ex parte Young* doctrine." App., *infra*, 84a.

This Court has identified three aspects of *Ex parte Young* that address the concerns that undergird the Eleventh Amendment, and the principles of state sovereign immunity that it reflects.

First, because the Eleventh Amendment was animated by a desire to protect state treasuries, *Ex parte Young* does not permit retroactive damage awards and permits only prospective equitable relief. *See Edelman v. Jordan*, 415 U.S. 651, 669 (1974).

Second, to protect the dignity of the State, *Ex parte Young* does not permit suits against the State *in eo nomine* and permits only suits against individual state officials. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). This requirement also comports with the common law rationale that a state official who violates federal law exceeds his authority and is no longer shielded by the State's immunity.

Finally, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, it requires an allegation that a federal right has been violated and is not available to address whether state

officials have violated state law. *See Pennhurst*, 465 U.S. at 121.

None of these limits are implicated by this suit. This is a suit for prospective relief against a state official to vindicate federal law. It is the classic *Ex parte Young* suit.

The Fourth Circuit resisted this conclusion by contending that there was no historical analog for such a suit. But, in fact, in England, the legal doctrine that allowed suits against government officials (as opposed to the King *in eo nomine*) had been used by government entities as well as private persons. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 17-18 (1963).

Second, the Fourth Circuit described this suit as "intramural" and thus not appropriate for resolution in federal court. App., *infra*, 17a. But the Fourth Circuit did not explain why it viewed this case brought by an independent state agency as intramural compared to suits brought by private corporations chartered by Virginia. Historically, States granted charters to private and municipal corporations through legislation, and identified precisely the powers and duties of that corporation, and (assuming it reserved the authority to do so, *see Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)), the State was free to amend and revoke those charters at its discretion. *See* Lawrence M. Friedman, *A History of American Law* 190-191,

197-198 (2d ed. 1985). Even today, with the more routinized grant of charters of incorporation through general enabling acts, the State reserves the right to amend the laws governing private corporate charters. *See, e.g.*, Va. Const. art. IX, § 6.

To the extent the Fourth Circuit was suggesting a lack of concrete adversity between the parties, such a concern has never been a question relevant to Eleventh Amendment immunity. In any event, this Court has already held that suits between state agencies can have the requisite level of adversity. *See Lassen v. Arizona ex rel. Arizona Highway Dep't.*, 385 U.S. 458, 460 n.1 (1967) ("This action is in form and substance a controversy between two agencies of the State of Arizona * * *. We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause."); *see also Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) (adjudicating suit between State and state agency); *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (adjudicating suit between Guam Governor and Guam Attorney General).[6] Those adjudications are

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[6] Respondents did not challenge petitioner's standing in the district court or in its appellate briefing, but did advert to the question in a supplemental letter and in their response to the petition for rehearing en banc. There can be no dispute, however, that the elements of Article III standing have been met. The failure to obtain the records to which federal law entitles VOPA is a type of "injury in fact" that this Court has

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consistent with this Court's case law that permits federal agencies to sue one another in those situations in which the President cannot dictate the outcome because one of the agencies is structurally "independent." *See United States v. Nixon*, 418 U.S. 683, 693-697 (1974); *United States v. ICC*, 337 U.S. 426, 460-461 (1949).

In this case, respondent Reinhard is appointed by and serves as the head of a state agency at the pleasure of the Governor, Va. Code §§ 37.2-301, -302, and the other two respondents report to respondent Reinhard. By contrast, as noted above, petitioner is not subject to the control of the Governor—the Governor appoints only a minority of the board that governs petitioner, and members of that board can only be removed for good cause through a judicial proceeding. Further, petitioner's litigation is not subject to the control of Virginia's elected Attorney General. Thus, neither respondents nor any member of the Virginia executive branch can cause VOPA to compromise its federally-established statutory right

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repeatedly recognized, respondents' refusal to provide the records is the cause of that injury, and ordering respondents to provide the records will redress that injury. *See, e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information arguably subject to disclosure under federal law "constitutes a sufficiently distinct injury to provide standing to sue").

to records that are in the hands of respondents or its federally-established statutory duty to protect persons with disabilities and mental illness.

In these ways, petitioner is no differently situated for *Ex parte Young* purposes from any corporation chartered by Virginia seeking to enforce federal law. And, like those corporations, petitioner should be able to enforce its federal claims in federal court against state officials for prospective relief.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 28, 2009

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, Virginia Office for Protection and Advocacy, *Plaintiff-Appellee*, v. JAMES REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services of the Commonwealth of Virginia; DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center; CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital, *Defendants-Appellants*.	No. 08-1845
ALABAMA DISABILITIES ADVOCACY PROGRAM; KENTUCKY PROTECTION AND ADVOCACY; MARYLAND DISABILITY LAW CENTER; NATIONAL DISABILITY RIGHTS NETWORK; OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES (Connecticut), *Amici Supporting Appellee*.	

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:07-cv-00734-REP)

Argued: March 24, 2009

Decided: June 2, 2009

Before WILKINSON, Circuit Judge, Eugene E. SILER, Jr., Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation, and Robert J. CONRAD, Jr., Chief United States District Judge for the Western District of North Carolina, sitting by designation.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Senior Judge Siler and Judge Conrad joined.

COUNSEL

ARGUED: William Eugene Thro, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Paul James Buckley, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Richmond, Virginia, for Appellee. **ON BRIEF:** Robert F. McDonnell, Attorney General of Virginia, Stephen R. McCullough, State Solicitor General, William C. Mims, Chief Deputy Attorney General, Jane D. Hickey, Senior Assistant Attorney General, Allyson K. Tysinger, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Patrick

D. Conner, Washington, D.C.; Rachelle M. Barstow, Julia N. Miller, Taylor A. Spearnak, New York, New York, for Amici Supporting Appellee.

OPINION

WILKINSON, Circuit Judge:

A state agency known as the Virginia Office for Protection and Advocacy, or "VOPA," brought this action in federal court against three Virginia officials in their official capacities. VOPA claims that the defendant state officials are violating federal law and seeks declaratory and injunctive relief. We hold that sovereign immunity bars VOPA's suit. While Congress could seek to provide a federal forum for this action through its abrogation power or by requiring a waiver of the states' sovereign immunity in exchange for federal funds, Congress has attempted neither of those options here. And we decline to expand the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to lift the bar of sovereign immunity in federal court when the plaintiff is a state agency. VOPA may pursue its claims in state court, but it would be inconsistent with our system of dual sovereignty for a federal court to rely on *Ex parte Young* to adjudicate an intramural state dispute like this one. Accordingly, we reverse the judgment of the district court and remand this case with directions to dismiss it.

I.

VOPA is an "independent state agency" in Virginia that protects and advocates for the rights of persons with mental illnesses and developmental disabilities. *See* Va. Code Ann. § 51.5-39.2(A); *Va. Office for Prot. & Advocacy v. Reinhard*, 405 F.3d 185, 187 (4th Cir. 2005). Congress encourages the states to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of two federal statutes: the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001-15115 ("DD Act"), and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10851 ("PAIMI Act"). Under those acts, states may choose to make their protection and advocacy systems either public agencies or private, nonprofit entities. *See* 42 U.S.C. §§ 15044(a), 10805(c)(1)(B); 45 C.F.R. § 1386.20. Virginia chose the public option.

In accordance with the requirements for receiving federal funds, Virginia law authorizes VOPA to engage in various pursuits on behalf of the mentally ill and the disabled, such as investigating complaints of discrimination, abuse, and neglect. *See* Va. Code Ann. § 51.5-39.2(A); 42 U.S.C. §§ 15043, 10805. Two features of VOPA's authority under Virginia law are particularly relevant in this case. First, VOPA operates independently of the Office of the Attorney General in Virginia and employs its own legal counsel. Va. Code Ann. §§ 2.2-510(5), 51.5-39.2(A). Second, VOPA has the authority, consistent with the requirements of

the DD and PAIMI Acts, to access "the records of an individual with a disability" in certain circumstances, including the situation in which VOPA has probable cause to believe that a person has been abused or neglected. Va. Code Ann. § 51.5-39.4(5); *see* 42 U.S.C. §§ 15043(a)(2)(I)-(J), 10805(a)(4).

VOPA claims in this action that Virginia is denying VOPA access to certain records in violation of the DD and PAIMI Acts. In particular, VOPA seeks declaratory and injunctive relief providing it access to "peer review" records relating to three persons who died or were injured in facilities for the mentally ill. The facilities in question are operated by another state agency in Virginia, the Department of Mental Health, Mental Retardation and Substance Abuse Services. The defendants are three officials in that department, named in their official capacities ("the state officials").

Before the district court, the state officials moved to dismiss VOPA's complaint on two grounds. First, they argued that VOPA had failed to state a claim on which relief could be granted because the state officials were not violating federal law. Specifically, the state officials argued that peer review records were privileged under Virginia law and that federal regulations under the DD Act and the PAIMI Act left that state-law privilege intact. *See* 42 C.F.R. § 51.41(c)(4); 45 C.F.R. § 1386.22(c)(1). Second, the state officials argued that Virginia's sovereign immunity barred VOPA's suit in any event.

The district court denied the state officials' motion to dismiss on both grounds. First, the court held that VOPA had stated a claim that the state officials were violating federal law and that the state officials' argument based on the peer review privilege was inappropriate for resolution on a Rule 12(b)(6) motion because it was an "affirmative defense to the merits." And second, the court held that sovereign immunity did not bar VOPA's suit. The district court agreed with the state officials that Congress had not abrogated Virginia's sovereign immunity, nor had Virginia waived its sovereign immunity against this action. However, the court agreed with VOPA that this suit satisfied the sovereign immunity exception of *Ex parte Young*, 209 U.S. 123 (1908), because VOPA had sued the state officials for prospective relief from an ongoing violation of federal law. In reaching that conclusion, the district court rejected the state officials' argument that the doctrine of *Ex parte Young* did not permit a suit in federal court by one state agency against officials of another agency of the same state.

The state officials immediately appealed the district court's sovereign immunity decision (and only that decision) under the collateral order doctrine; our review is *de novo*. *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002).

II.

State sovereign immunity is a bedrock principle of "Our Federalism." *Younger v. Harris*, 401 U.S. 37,

44 (1971). Indeed, the "central purpose" of the sovereign immunity doctrine "is to 'accord the States the respect owed them as' joint sovereigns." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). When the Constitution "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), the states "did not consent to become mere appendages of the Federal Government," *Fed. Mar. Comm'n*, 535 U.S. at 751. Rather, they consented to a system of dual sovereignty, and the states therefore "entered the Union 'with their sovereignty intact.'" *Id.* (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

Along with their status as sovereigns, the states retained "the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 714 (1999). And one of those essential attributes of sovereignty retained by the states is immunity from suit absent their consent. *See Fed. Mar. Comm'n*, 535 U.S. at 751-52; *Alden*, 527 U.S. at 715-19; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). While the Eleventh Amendment reflects this foundational principle of sovereign immunity, the Amendment does not define the immunity's scope. *See, e.g., Alden*, 527 U.S. at 727-30.

Exceptions to the states' sovereign immunity do exist, however. *See, e.g., Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 291-92 (4th Cir. 2001). Three of those

exceptions are pertinent here. First, "Congress may abrogate a State's immunity pursuant to its enforcement power under § 5 of the Fourteenth Amendment." *Id.* at 291 (citing *Seminole Tribe*, 517 U.S. at 59). Second, a state may waive its sovereign immunity if it consents to suit in federal court. *Id.* at 292. Third, the states' sovereign immunity "does not preclude private individuals from bringing suit against State officials for prospective injunctive or declaratory relief designed to remedy ongoing violations of federal law." *Id.* (citing *Ex parte Young*, 209 U.S. 123).

The parties correctly agree that Virginia's sovereign immunity bars VOPA's suit against the state officials in their official capacities unless one of these exceptions to sovereign immunity applies. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Bragg*, 248 F.3d at 289-92. We therefore examine each of the three relevant exceptions in turn.

III.

We begin with abrogation. To abrogate the states' sovereign immunity, Congress must both "unequivocally express[] its intent to abrogate" and "act[] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). We agree with the state officials and the district court that Congress has not unequivocally expressed its intent to abrogate Virginia's sovereign immunity in this case. Indeed, VOPA does not argue that Congress has made any effort, much less a clear one, to

abrogate the states' immunity in the DD Act or the PAIMI Act. Thus, the abrogation exception does not permit VOPA's suit against state officials.

We do not hold, however, that Congress is powerless to abrogate in the circumstances presented by this case. Indeed, the Supreme Court and this court have upheld Congress's authority to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment in certain actions involving the rights of disabled persons under Title II of the Americans with Disabilities Act. *See United States v. Georgia*, 546 U.S. 151, 159 (2006); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005). Moreover, the *Lane* decision specifically referenced "unconstitutional treatment of disabled persons by state agencies in a variety of settings, including . . . the abuse and neglect of persons committed to state mental health hospitals." *Lane*, 541 U.S. at 524-25 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)). That sort of "unconstitutional treatment" would be relevant to an effort by Congress to abrogate the states' immunity against a suit by an entity like VOPA.

Of course, Congress's power to abrogate sovereign immunity is not unlimited. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 374 (2001) (invalidating Congress's attempt to abrogate in actions under Title I of the ADA). But Congress could at least attempt to exercise its abrogation authority under the DD Act or the PAIMI Act if it believed that

suits like this one belong in federal court. As of now, however, Congress has not even tried.

IV.

We turn next to the issue of waiver. VOPA claims that Virginia waived its sovereign immunity against this action by choosing to receive federal funding under the DD Act and the PAIMI Act because Congress conditioned that funding on the Commonwealth's consent to be sued in federal court. In particular, VOPA argues that the following provision of the DD Act placed Virginia on notice that it was waiving its sovereign immunity: "Nothing in this subchapter shall preclude a system from bringing a suit on behalf of individuals with developmental disabilities against a State, or an agency or instrumentality of a State." 42 U.S.C. § 15044(b)(1).

VOPA's waiver argument is not persuasive. The Supreme Court has held repeatedly that the waiver of a state's sovereign immunity requires an explicit, emphatic statement. That is, a state waives its immunity from suit in federal court only where that waiver is "stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (internal quotations and alteration omitted). The purpose of this "stringent" test is "to be certain that the State in fact consents to suit." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675,

680 (1999). Thus, we will not find "consent by implication or by use of ambiguous language." *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986) (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

A state does not waive its sovereign immunity through its mere receipt of federal funds or participation in a federal program. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985). Instead, Congress must also express "a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity." *Id.* at 247; *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (recognizing that Congress must "codify a clear, unambiguous, and unequivocal condition of waiver"). These strict requirements reflect both the importance of sovereign immunity in our federal system and the fact that a waiver of sovereign immunity is "an exercise, rather than a limitation of, State sovereignty." *Madison v. Virginia*, 474 F.3d 118, 129 (4th Cir. 2006); *Litman*, 186 F.3d at 550.

Applying these principles, we agree with the district court that the provision of the DD Act cited by VOPA is not sufficiently explicit to waive Virginia's sovereign immunity. Indeed, the language in that provision is far from the emphatic, "express," and "unequivocal" statement that is necessary to constitute a waiver. The district court correctly observed that Section 15044(b)(1) "simply indicates an intent not to abrogate any preexisting rights to sue." That section does not, however, provide states with the necessary

notice that they are consenting to suits in federal court that their sovereign immunity would otherwise bar.

The insufficiency of Section 15044(b)(1) as a waiver provision is particularly apparent in comparison to other provisions in which we have found a valid waiver of sovereign immunity. In *Constantine*, for example, we held that a state had consented to suit under the Rehabilitation Act based on "an unambiguous and unequivocal condition requiring waiver of Eleventh Amendment immunity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 492 (4th Cir. 2005). The waiver section in that case provided:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7 (citations omitted); *see also Litman*, 186 F.3d at 554 (holding that Section 2000d-7 also constituted a waiver of sovereign immunity for suits under Title IX). Unlike Section 2000d-7, the provision of the DD Act cited by VOPA does not refer to immunity, does not refer to the Eleventh Amendment, and does not even refer to suit in federal court.

Finding a waiver of sovereign immunity in these circumstances would only dilute the clear statement requirement for waiver and would do away with the established rule against consent through ambiguous language.

We note again, however, that we do not question Congress's authority – recognized in decisions like *Constantine* – to extract a waiver of the states' sovereign immunity in a case like this one. We hold only that Congress has not provided a sufficiently explicit statement to produce a waiver here.

V.

A.

We turn finally to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). VOPA argues, and the district court held, that the *Ex parte Young* exception to sovereign immunity permits VOPA's suit against the state officials in federal court. To support that argument, VOPA points to *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). There, the Supreme Court held that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit" against state officials in their official capacities, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 645 (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261,

296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)). VOPA argues that this action satisfies *Ex parte Young* under *Verizon Maryland*'s "straightforward inquiry" because VOPA, in seeking access to peer review records to which it is allegedly entitled under the DD and PAIMI Acts, is pursuing injunctive relief from an ongoing violation of federal law by state officials. And, VOPA contends, that should be the end of the matter.

But it is hardly so simple. While VOPA's reliance on a straightforward application of *Ex parte Young* may have superficial appeal, this case differs from *Ex parte Young* in a critical respect: the plaintiff there was not a state agency. Instead, the plaintiffs in *Ex parte Young* were private parties. *See* 209 U.S. at 143. And while no subsequent decision has expressly limited the application of *Ex parte Young* to suit by a private plaintiff, many decisions have recognized this basic element of the doctrine. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996) ("*[A]n individual* can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law. . . ." (emphasis added) (citing *Ex parte Young*, 209 U.S. 123)); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (referring to *Ex parte Young* suits by "private individuals"); *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (suits by "private citizens").

Moreover, VOPA has cited no case, nor have we found any, holding that – or even analyzing whether – the *Ex parte Young* doctrine applies equally when the

plaintiff is a state agency. *Cf. Verizon Md.*, 535 U.S. at 639-40 (suit by a private corporation). This lack of historical support for VOPA's suit is important in light of the Supreme Court's presumption that the states are immune from proceedings that were "anomalous and unheard of when the constitution was adopted." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).[1]

VOPA argues, however, that its status as a state agency should not affect our *Ex parte Young* analysis. Indeed, VOPA claims that the identity of the plaintiff is wholly irrelevant to the doctrine of *Ex parte Young*. But VOPA cites no authority for that proposition

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[1] The district court, in holding that VOPA could bring this action under *Ex parte Young*, stated that courts had previously decided the merits of cases brought by protection and advocacy systems "despite the presence of state agencies on opposing sides." However, the district court's reliance on many of these cases was erroneous because they involved suits by private protection and advocacy systems, not by state agencies. *See Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006); *see also Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1264 (10th Cir. 2003); *Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 425 (3d Cir. 2000). The public protection and advocacy system in Connecticut did bring one of the cases cited by the district court, but the decision in that case did not address the issue of sovereign immunity. *See Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119, 121 (2d Cir. 2006); *see also Office of Prot. & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 313 (D. Conn. 2003) (permitting a different suit by Connecticut's public protection and advocacy system under *Ex parte Young* without addressing the fact that the plaintiff was a state agency).

either – likely because VOPA's argument for an indiscriminate application of *Ex parte Young* cannot be reconciled with the guidance of the Supreme Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997). In that case, the Court held that the *Ex parte Young* exception did not permit a suit that was equivalent to a quiet title action and thereby implicated "special sovereignty interests" – even though the suit otherwise satisfied the requirements of *Ex parte Young*. 521 U.S. at 281. The Court warned against a "reflexive reliance" on *Ex parte Young* and the "empty formalism" of allowing any and all federal claims for injunctive relief against state officials to proceed in federal court. *Id.* at 270. And the Court held that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system," as well as a recognition that sovereign immunity "represents a real limitation on a federal court's federal-question jurisdiction." *Id.*

VOPA is therefore incorrect to argue for what amounts to a "reflexive reliance" on *Ex parte Young*. Instead, we confront a novel question: whether to expand the *Ex parte Young* exception to allow a suit, in federal court, by a state agency against officials of the same state. *See Coeur d'Alene Tribe,* 521 U.S. at 296-97 (O'Connor, J., concurring in part and concurring in the judgment) ("I would not narrow our *Young* doctrine, but I would not extend it to reach this case."). The state officials concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy

system. The limited question we face, therefore, is "whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*," when the plaintiff is a state agency. *Seminole Tribe*, 517 U.S. at 74.

B.

When we consider the sovereign interests and federalism concerns at stake, we are convinced that the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court. "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). And federal court adjudication of an "intramural contest" between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff. *Va. Office for Prot. & Advocacy v. Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring).[1]

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[1] The parties in the cited case were the same as in the present one, but the case involved a different claim by VOPA. We held that VOPA could not assert a claim under 42 U.S.C. § 1983 because VOPA was a state agency. *See* 405 F.3d at 190. The majority opinion did not address Virginia's sovereign immunity, but Judge Wilson alluded to the issue in a concurring opinion.

The *Ex parte Young* doctrine rests on the well-established fiction that a private party's suit to enjoin state officials from violating federal law is not a suit against the state. *See Antrican*, 290 F.3d at 184. An action by a state agency against state officials in federal court, by contrast, has no similar historical pedigree, and it would be a more obvious affront to a state's sovereign interests. Indeed, the infringement on a state's sovereign dignity would be substantial if a state agency, acting unilaterally, could force other state officials to appear before a federal tribunal. We therefore see no reason to extend the *Ex parte Young* doctrine to allow such a suit. Splintering a state's internal authority in this manner would be antithetical to our system of dual sovereignty. After all, "[t]he Framers split the atom of sovereignty" – they did not shatter it. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

In contrast to the expansion of *Ex parte Young* proposed by VOPA, the interest of the states in avoiding excessive federal meddling with their internal authority is well recognized in the Supreme Court's sovereign immunity jurisprudence. In *Alden v. Maine*, for example, the Supreme Court held that Congress did not have the power under Article I to abrogate the states' sovereign immunity in their own courts. 527 U.S. at 712. The Court recognized that if Congress had such a power, the federal government would be able "to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will." *Id.* at 749. The

Court renounced "[s]uch plenary federal control of state governmental processes" because it would "denigrate[ ] the separate sovereignty of the States." *Id.* Moreover, *Alden* recognized that for the federal government to "assert[ ] authority over a State's most fundamental political processes" would "strike[ ] at the heart of the political accountability so essential to our liberty and republican form of government." *Id.* at 751.

For similar reasons, the Supreme Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that *Ex parte Young* did not permit suits in federal court to enjoin state officials from violating state law. The Supreme Court in *Pennhurst* sought to avoid the significant "intrusion on state sovereignty" that would result "when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. That is, the Court recognized that federal court resolution of internal state disputes would "conflict [ ] directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*

The reasoning of *Alden* and *Pennhurst* is persuasive here. VOPA seeks to expand *Ex parte Young* to allow a federal court, without the imprimatur of Congress or the consent of the state, to resolve a dispute between a state agency and state officials. Recognizing an inherent power in the federal courts to settle this sort of internecine feud – "to turn the State against itself" – would disparage the status of the

states as sovereigns. *Alden*, 527 U.S. at 749. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability. *Cf. Alden*, 527 U.S. at 751. Where exactly could citizens dissatisfied with the outcome of such a federal court case turn for political redress? The answer is not obvious. For these reasons, granting a federal forum to "a state's warring factions" based on alleged violations of federal law would be an unwarranted extension of *Ex parte Young*. *VOPA*, 405 F.3d at 191 (Wilson, J., concurring).

The matter would be different, on the other hand, if Congress sanctioned this sort of suit. If Congress validly exercised its power under Section 5 of the Fourteenth Amendment to authorize an action like this one, the states would have no proper basis for complaint about the infringement on their sovereign dignity. Nor would states have a rightful grievance if Congress required the states' informed consent to this type of action in exchange for federal funds. And in those cases, citizens could hold Congress or the states politically accountable for the results. But based on the concerns expressed in the Supreme Court's sovereign immunity decisions – as well as the evident

historical paucity of this sort of action and the Supreme Court's presumption against permitting "anomalous and unheard-of proceedings" against the states, *Alden*, 527 U.S. at 727 – to allow this suit to proceed under *Ex parte Young* would go too far.

C.

VOPA insists, however, that this action does not actually implicate any special sovereign interests on the part of Virginia. Instead, VOPA argues that this suit, like all *Ex parte Young* actions, is primarily about enforcing federal law. VOPA points out that Virginia accepted federal funds under the DD Act and the PAIMI Act and created VOPA to enforce the accompanying requirements of those statutes. And VOPA argues that Virginia and its officials therefore have no sovereign interest in avoiding VOPA's use of *Ex parte Young*. In other words: "This is not, as the state officials mischaracterize it, simply an intramural contest between state agencies. . . . [T]he question is whether the state officials are required to comply with federal law." *Brief for Appellee* at 7-8.

These arguments are unpersuasive as well. As an initial matter, VOPA's emphasis on the enforcement of federal law proves too much. The Supreme Court in *Alden* specifically rejected the "contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States." 527 U.S. at 732. Instead, the Court held that even federal law must be applied "in a manner consistent with the

constitutional sovereignty of the States." *Id.* Indeed, if a federal claim alone were enough to invoke *Ex parte Young,* many of the Supreme Court's cases, including *Coeur d'Alene Tribe,* would have been wrongly decided.

Moreover, the Supreme Court has recognized in cases related to the political subdivisions of the states that alleging a violation of federal law does not itself override the states' interest in maintaining their sovereignty with respect to internal state conflicts. These cases demonstrate that the parties to a dispute matter in deciding whether a federal forum is available.

To be specific, the Supreme Court has held repeatedly that political subdivisions of states could not obtain relief under federal law against the application of state statutes, even where the political subdivisions claimed that the state laws in question violated the federal constitution. *See, e.g., Williams v. Mayor of Balt.,* 289 U.S. 36 (1933); *City of Trenton v. New Jersey,* 262 U.S. 182 (1923); *Stewart v. City of Kansas City,* 239 U.S. 14 (1915); *Hunter v. City of Pittsburgh,* 207 U.S. 16 (1907); *see also Rogers v. Brockette,* 588 F.2d 1057, 1067-68 (5th Cir. 1979) (collecting additional cases). In *City of Trenton,* for example, Trenton challenged – under the Contract Clause and the Fourteenth Amendment – a New Jersey statute imposing a fee on the city for withdrawing water from the Delaware River. *See* 262 U.S. at 183-84. The Supreme Court rejected the challenge because Trenton, as a "creature of the State . . . subject to the

sovereign will" could not "invoke such restraints upon the power of the State." *Id.* at 187-88. And in *Williams,* the Supreme Court rejected a challenge brought by the cities of Baltimore and Annapolis on constitutional grounds against a Maryland statute, holding that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." 289 U.S. at 40.

Sovereign immunity was not at issue in these political subdivision cases. *See, e.g., City of Trenton,* 262 U.S. at 183 (suit brought by state against city in state court); *Williams,* 289 U.S. at 39 (state itself not a party). But these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged violation of federal law, the *nature of the party* making the federal claim implicated the state's interest in keeping its internal authority intact. Moreover, the Court demonstrated, consistently and emphatically, its unwillingness to override the states' control of their own internal disputes.

In keeping with this line of decisions, numerous circuit courts have heeded the Supreme Court's reluctance to adjudicate intramural state conflicts and have therefore rejected federal suits by political subdivisions against their states. These cases further demonstrate that the parties to an action, not merely the nature of the claim, affect the state interests involved. In *Stanley v. Darlington County School*

District, 84 F.3d 707 (4th Cir. 1996), for example, we held that a local school district could not bring a contribution claim under the Fourteenth Amendment against the state because such an exercise of federal court jurisdiction would be "an unfathomable intrusion into a state's affairs." *Id.* at 716-17 (citing *City of Trenton*, 262 U.S. at 186, 188; *Hunter*, 207 U.S. at 178-79); *see also, e.g., DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 689-90 (11th Cir. 1997); *Harris v. Angelina County*, 31 F.3d 331, 339-40 & n.10 (5th Cir. 1994). And at least one circuit court has extended this reasoning to suits brought by state entities, holding that a state university lacked standing to sue a state board of education under the Fourteenth Amendment. *United States v. Alabama*, 791 F.2d 1450, 1455-56 (11th Cir. 1986); *see also Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (observing that "a state agency has no constitutional rights to assert against the state that created it").[3]

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[3] Some of these decisions, like *United States v. Alabama*, rely on the concept of standing (not sovereign immunity) to reject federal court jurisdiction over internal state disputes. *See also, e.g., City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 232-34 (9th Cir. 1980) (holding that a city lacked standing to bring constitutional claims against a political subdivision for injunctive and declaratory relief). *But see, e.g., Rogers v. Brockette*, 588 F.2d 1057, 1070 (5th Cir. 1979) (interpreting *City of Trenton* and *Hunter* to hold on the merits, rather than as a matter of standing, that "the Constitution does not interfere with a state's internal political organization"). These cases thereby suggest yet another potential bar against entertaining

(Continued on following page)

D.

VOPA also argues that denying it access to federal court will lead to inconsistent application of substantive protections for persons with disabilities. For example, VOPA claims that "federal law [will] apply differently" in different jurisdictions because private protection and advocacy systems in other states, unlike VOPA, will be able to sue state officials in federal court. *Brief for Appellee* at 13. VOPA also argues that, within Virginia, disabled persons in public facilities will "not enjoy the same protections under federal law" as disabled persons in private facilities if VOPA cannot sue the state officials in federal court. *Id.*

These concerns are illusory. The state officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks here. Specifically, the parties agree that at a minimum Virginia's sovereign immunity would not bar an original action by VOPA for a writ of mandamus brought in the Virginia Supreme Court. And in such a suit, the Supremacy Clause requires Virginia courts to enforce federal law. U.S. Const. art.

VOPA's suit in federal court, as it is not clear that VOPA has the requisite standing to sue. Because this appeal arises under the collateral order doctrine, however, we need only address the issue of sovereign immunity and need not decide whether VOPA has standing. *See Rux v. Republic of Sudan*, 461 F.3d 461, 467 & n.1, 475-76 & n.8 (4th Cir. 2006); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 974 & n.1 (10th Cir. 2001); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334-36 (11th Cir. 1999).

VI, cl. 2; *Testa v. Katt*, 330 U.S. 386, 389, 391, 394 (1947); *Printz v. United States*, 521 U.S. 898, 928-29 (1997). VOPA is therefore incorrect to argue that our decision will cause any discrepancies in the application of substantive federal law. Moreover, the Supreme Court has the authority to review decisions by state courts on matters of federal law without regard to sovereign immunity. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31 (1989).

VOPA suggested at oral argument that it would be more expedient to seek relief in federal rather than state court. But the purpose of our federal system is not "administrative convenience." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). Rather, dual sovereignty is meant to protect our "fundamental liberties," and sovereign immunity serves to maintain the essential federal-state balance. *Id.* (quoting *Atascadero*, 473 U.S. at 242).

E.

Finally, VOPA argues that denying it access to federal court based on Virginia's sovereign interests is inconsistent with state law. VOPA points out that Virginia law designates VOPA as an independent agency. For example, VOPA operates independently of the Office of the Attorney General in Virginia and can retain its own legal counsel. Because Virginia has exercised its sovereignty in making VOPA an independent entity under state law, VOPA suggests that

Virginia cannot invoke its sovereign interests to complain when VOPA uses that independence to sue Virginia's officials in federal court under *Ex parte Young*.

This argument is erroneous. While Virginia did grant VOPA some independence under state law, that limited independence in no way implies that Virginia granted VOPA the authority to sue the Commonwealth or its officials in federal court. Indeed, VOPA does not point to any provision of state law to that effect. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). Thus, we interpret VOPA's independence to suggest only what the state officials have conceded in this case – that VOPA can bring this suit in state court.

Furthermore, VOPA's argument based on its independence has the problem of being potentially limitless. Many other state entities have features of independence. For example, the State Corporation Commission in Virginia is a state agency that also has the authority to hire its own legal counsel outside of the Attorney General's office. *See* Va. Code Ann. § 12.1-18. And public universities in Virginia are governed by boards that have the same powers as corporations and that are subject to the control of the General Assembly. *See, e.g.,* Va. Code Ann. § 23-69 (University of Virginia); *Litman v. George Mason Univ.,* 186 F.3d 544, 547 (4th Cir. 1999). If we were to adopt VOPA's position, these state entities and

countless others might suddenly possess the authority to pursue *Ex parte Young* actions against other state officials. After all, nearly every state agency receives federal funding and must comply with federal law of some sort, so under VOPA's argument, nearly every state agency would be subject to an *Ex parte Young* suit by another supposedly independent arm of the state. As we have learned from experience, an exception like the one VOPA proposes, given time, tends to expand far beyond its original scope. There is no telling where that expansion might end here, and we are not disposed to find out.

VI.

VOPA's argument ultimately boils down to the claim that, if VOPA is to maximize its effectiveness in representing the federal rights of persons with disabilities and mental illnesses, VOPA should be able to bring this suit in federal court. We express no view on that claim. We hold only that, because VOPA is a state agency, *Ex parte Young* is the improper vehicle for VOPA to gain access to a federal forum. This holding in no way limits the scope of *Ex parte Young* for private plaintiffs. We also do not hold that Congress lacks the authority to grant VOPA access to federal court – indeed, Congress could attempt to abrogate the states' immunity from suit or seek a waiver of that immunity in return for federal funds. And for now, VOPA can enforce federal law in state court, where we have no reason to think that VOPA will not find a just resolution of its claims. However,

allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states. And expanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the "real limitation[s]" of the doctrine of sovereign immunity. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). The judgment of the district court is therefore reversed, and the case is remanded with directions to dismiss it.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE COMMONWEALTH
OF VIRGINIA, VIRGINIA
OFFICE FOR PROTECTION
AND ADVOCACY,

Plaintiff,

v. Civil Action No. 3:07cv734

JAMES S. REINHARD, in
his official capacity, etc. *et al.*,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on the Renewed Motion to Dismiss (Docket No. 22) the Complaint filed by the Virginia Office for Protection and Advocacy ("VOPA") against James Reinhard, Denise Micheletti, and Charles Davis in their official capacities as the directors or officers of the Department of Mental Health, Mental Retardation and Substance Abuse Services ("DMHMRSAS"), the Central Virginia Training Center ("CVTC"), and the Central State Hospital ("CSH"). VOPA alleges that the Defendants are violating federal law by refusing to grant it access to records to which it is entitled under its enabling statutes. Accordingly, VOPA seeks declaratory and injunctive relief. Defendants argue that the Complaint should be dismissed either under Fed. R. Civ.

P. 12(b)(1), on sovereign immunity grounds, or Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion to dismiss will be denied.

BACKGROUND

VOPA is Virginia's Protection and Advocacy system for persons with disabilities, a system created under the aegis of federal statute. *See* Development Disabilities Assistance and Bill of Rights Act ("DD Act") 42 U.S.C. § 15001, *et. seq.*, and its implementing regulations, 45 C.F.R. § 1385, *et. seq.*; the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. § 10801, *et. seq.*[1] Eligible protection and advocacy systems, including VOPA, have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities. 42 U.S.C. §§ 15043, 10805; Code of Va. § 51.5-39.4. Federal law also affords protection and advocacy systems, such as VOPA, access to the records of

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[1] Prior to amendment by Public Law 106-310 in 2000, the Act was known as the "Protection and Advocacy for Mentally Ill Individuals Act of 1986," or "PAMII." *See* 42 U.S.C.A. § 10801 (Thomson Reuters/West 2008). In 2000, Congress amended the short title so that the Act is now known as the "Protection and Advocacy for Individuals with Mental Illness Act" or "PAIMI." *See id.*; *Prot. & Advo. for Pers. with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119, 120 n.1 (2d Cir. 2006). This opinion shall refer to the Act as the "PAIMI Act," as it was alleged in the Complaint, even where an individual court has described it as PAMII in its opinion.

individuals who are the subjects of investigations where certain conditions are met, including where there is probable cause to believe that such individual has been subject to abuse or neglect. 42 U.S.C. §§ 15043, 10805, 10806.

As alleged in the Complaint, VOPA is seeking records related to three incidents of deaths and injuries of residents of CVTC and CSH while in the custody of DMHMRSAS. DMHMRSAS has refused to provide the requested records, claiming peer review privilege. VOPA asserts that it is entitled to receive this information under federal law and that it is unlawful for DMHMRSAS to restrict VOPA's ability to conduct statutorily authorized investigations. VOPA is suing the Commissioner and the Directors of the respective organizations in their official capacities and requesting injunctive relief.

Defendants do not challenge the sufficiency of the factual allegations, but move the Court to dismiss the case on two grounds. First, Defendants argue that the case should be dismissed for failure to state a claim under Rule 12(b)(6) because their refusal to turn over the records comports with a federal regulation, and thus cannot form the basis for an allegation of a violation of federal law. Second, Defendants argue that they are protected by sovereign immunity and that the case should be dismissed under Rule 12(b)(1). As explained below, both of these arguments fail.

DISCUSSION

A. Standards of Review

1. Failure to State a Claim under Rule 12(b)(6)

To survive a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). To meet this standard, "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.* at 1965, and critical elements of a claim must be, at a minimum, "suggested by the facts." *Id.* at 1973. A plaintiff must provide "more than labels and conclusions" and the Court specifically noted the insufficiency of "a formulaic recitation of the elements of a cause of action." *Id.* at 1965. Notwithstanding the plausibility requirement of *Bell Atlantic*, courts still "should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

2. Sovereign Immunity Analysis under Rule 12(b)(1)

An assertion of sovereign immunity is properly addressed under Fed. R. Civ. P. 12(b)(1). *Smith v. Washington Metro. Area Transit Auth.*, 290 F.3d 201, 205 (4th Cir. 2002). If a governmental entity challenges jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of persuasion. *Id.* A court may

address its lack of subject matter jurisdiction in two ways: it may find insufficient allegations in the pleadings, viewing the alleged facts in the light most favorable to the plaintiff, similar to a 12(b)(6) inquiry; or, after an evidentiary hearing, the court may weigh the evidence in determining whether the facts support the jurisdictional allegations. *Lovern v. Edwards*, 190 F.3d 648, 655 (4th Cir. 1999). The parties have neither requested an evidentiary hearing, nor briefed the sovereign immunity issue under that mode of analysis, so the Court will proceed according to the first method.

B. Analysis

1. Sufficiency of the Complaint

Defendants argue that VOPA has not stated a plausible claim for relief because their refusal to turn over the requested materials is in compliance with federal regulations; and, therefore, refusal to turn over the records cannot be a violation of federal law. Defendants claim that, unless VOPA is able to prove that the challenged regulations are invalid, VOPA cannot state a cognizable claim.

VOPA has clearly alleged an ongoing violation of federal law: that the Defendants refuse to provide records that are required to be provided to VOPA by the PAIMI and DD Acts. The Defendants argue that their actions are insulated because their records are covered by state peer review privilege, Va. Code §§ 8.01-581.16, 581.17, and by federal regulations

which provide that state law protections for records are not preempted. 42 C.F.R. § 51.41(c)(4), 45 C.F.R. 1386.22(c)(1). The argument of the Defendants is an affirmative defense to the merits of the Complaint and, as such, is not appropriate for resolution under Rule 12(b)(6). "[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville,* 464 F.3d 480, 483 (4th Cir. 2006) (internal quotations and citations omitted).

2. Sovereign Immunity

States enjoy a sovereign immunity from private suits. *Alden v. Maine,* 527 U.S. 705 (1999). Much of modern day sovereign immunity jurisprudence has been developed from the Eleventh Amendment, but sovereign immunity is broader than the strictures of the Eleventh Amendment. *Id.* at 712-13. There are three dominant exceptions to sovereign immunity. First, Congress may abrogate sovereign immunity if: (1) it validly acts "pursuant to a constitutional provision granting Congress the power to abrogate"; and (2) it has "unequivocally expressed its intent to abrogate the immunity." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 55, 59 (1996). This exception is not at issue in this action. Second, states may voluntarily waive sovereign immunity from suit either by explicitly consenting to suit, or by accepting from Congress a gift or gratuity that is conditioned on such a waiver. *Atascadero State Hose. v. Scanlon,* 473 U.S. 234, 241

(1985); *College Savings Bank v. Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Finally, federal courts have jurisdiction in certain cases over suits that seek prospective injunctive relief against a State officer alleged to be perpetrating an ongoing violation of federal law. *See Ex parte Young*, 209 U.S. 123 (1908).

a. Waiver by the State

VOPA argues that, given the statutorily defined purpose and mission of protection and advocacy systems, the text of the DD Act puts the States on notice that the receipt of "federal funds to which the protection and advocacy system requirements attach" constitutes a waiver of sovereign immunity. (Pl.'s Resp. to Def.'s Renewed Mot. to Dismiss 7.) The statutory predicate for VOPA's position provides that: "Nothing in this title shall preclude a system from bringing a suit on behalf of individuals with developmental disabilities against a State, or an agency or instrumentality of a State." 42 U.S.C. § 15044(b)(1).

Defendants make a three-pronged argument as to why there is no waiver: first, the statute does not constitute a waiver of sovereign immunity; second, if the statute constitutes a waiver of sovereign immunity, that waiver is limited to instances where VOPA is suing on behalf of another, as compared to this suit where it is suing in its own name; and third, the waiver is inapplicable where the protection and

advocacy system is a state agency rather than a non-profit entity.

The analysis of VOPA's position is informed by several basic principles. First, it is settled that a wavier [sic] of this sort must be prompted by a Congressional manifestation of "a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity." *Booth v. State of Md.*, 112 F.3d 139, 145 (4th Cir. 1997) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985)). Second, "[a] waiver must be unequivocally expressed in statutory text." *Madison v. Virginia*, 474 F.3d 118, 130 (4th Cir. 2006) (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Third, it is established that general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity. *Id.* (citing *Atascadero*, 473 U.S. at 246–47). Finally, consent to suit is never implied and ambiguities are construed in favor of immunity. *Id.* at 131 (citing *Atascadero*, 473 U.S. at 247 and *United States v. Nordic Village, Inc.*, 504 U.S. 30, 34 (1992)).

Cases in which courts have found waiver have involved statutes with far more explicit provisions than the one VOPA has cited here. The requisite expression of "a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity" cannot be found in the text of § 15044(b)(1). *See Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989) (finding no clear statement of intent to waive sovereign immunity and thus no

abrogation of sovereign immunity in § 106 of the Bankruptcy Code); *Employees of Dep't of Public Health and Welfare v. Dep't of Public Health and Welfare,* 411 U.S. 279 (1973) (finding no abrogation of sovereign immunity under the Fair Labor Standards Act).

VOPA asserts that Defendants' argument relies on cases in which plaintiffs sought monetary damages. However, VOPA has provided no decision which supports a differentiation between cases involving damages versus those involving injunctive relief, and the doctrine does not support such a distinction. VOPA relies on *Litman v. George Mason University,* 186 F.3d 544 (4th Cir. 1999), for articulating the standard for determining waiver through consent. *Litman,* consistent with other precedent on the issue, requires clear waiver, with no differentiation between the type of relief sought. *Id.* at 550-551 (requiring a "clear declaration" by the State of its waiver and stating that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court") (internal citations and quotations omitted).

In *Litman,* the Fourth Circuit found a clear conditional waiver of sovereign immunity where the relevant statute included the provision "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of [select civil rights statutes]." 42 U.S.C. § 2000d-7(a)(1). *See also Constantine v. Rectors and Visitors of George Mason Univ.,* 411 F.3d 474, 492 (4th Cir. 2005) (expanding on

Litman to find same provision to be an effective waiver of the Eleventh Amendment). Another example of a statute that has been considered to establish a clear waiver of sovereign immunity is 20 U.S.C. § 1403, part of the Individuals with Disabilities Education Act ("IDEA"), which provides: "a State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal Court for a violation of [the IDEA]." *See* VOPA v. Virginia, 262 F. Supp. 2d 648, 655 (E.D. Va. 2003).

In *Madison v. Virginia,* the Fourth Circuit analyzed whether the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") contained a provision requiring waiver of sovereign immunity. 474 F.3d 118 (4th Cir. 2006). The text of the statute provided that any person may "assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The Court of Appeals found that, by voluntarily accepting federal correctional funds in the face of this provision, the State consented to federal jurisdiction for at least some form of relief. *Madison,* 474 F.3d at 131. However, strictly construing the scope of the waiver, the Fourth Circuit held that the statute fell short of the "unequivocal textual expression necessary to waive State immunity from suits for damages," explaining that the statute made no reference to monetary relief or even to sovereign immunity generally. *Id.*

The provision on which VOPA relies does not create any right to sue, much less indicate un [sic]

unmistakable intent to waive state immunity from any suit. In stating that "[n]othing in this title shall preclude . . . ," 42 U.S.C. § 15044(b)(1) simply indicates an intent not to abrogate any preexisting rights to sue, but the provision does not create any new rights. Sovereign immunity would bar VOPA's ability to bring this lawsuit if there were no other exception to the immunity.

VOPA also presents a quasi-estoppel theory, arguing that Defendants should not now be allowed to argue the invalidity of a provision on which the State has relied to receive federal funding, but that argument assumes a non-existent position. Defendants are not arguing that any provision of the PAIMI or DD Acts is invalid; merely that the Acts contain no unequivocal statement of consent to suit. The quasi-estoppel argument theory is neither persuasive nor useful in deciding the current motion.[3]

b. Ex parte Young

It is uncontested that VOPA has filed this action against officials in their official capacities, a predicate for the application of the *Ex parte Young* exception. Defendants argue that VOPA has not alleged an ongoing violation of federal law. Defendants claim that they are following a federal regulation and, consequently, VOPA cannot allege an ongoing violation of

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[3] It is not necessary for the Court to address the remainder of the Defendants' arguments relating to the waiver issue.

federal law unless it first challenges the regulation. VOPA argues that its complaint satisfies the *Ex parte Young* exception in seeking injunctive relief against officials in their official capacities for an ongoing violation of federal law and that this Court must therefore deny the Defendants' motion.

In determining whether the *Ex parte Young* doctrine applies, a court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (internal quotations omitted). In *Verizon*, the Supreme Court overturned the Fourth Circuit's decision that the plaintiff's claim could not be brought under *Ex parte Young* because the challenged order was probably not inconsistent with federal law after all. *Id.* at 646. In doing so, the Court explained that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.*

Application of the decision in *Verizon* here necessitates the conclusion that the action can proceed. First, VOPA has alleged an ongoing violation of federal law: that Defendants continue to refuse to provide records as required under the DD and PAIMI Acts. ("By refusing to provide the access requested by VOPA, Defendants have violated the DD Act/PAIMI Act and the regulations promulgated pursuant to it.") (Compl. ¶¶ 42, 50.) As set forth in Part B.1 above, the Complaint here is legally sufficient. Second, VOPA

seeks relief that is properly characterized as prospective: an injunction that the officials prospectively release the records. The argument of the Defendants that they properly relied on the federal regulations is an argument on the merits of the claim and does not bring this case outside of the *Ex parte Young* exception.

Moreover, several courts of appeals have held that conduct such as that in which the Defendants are engaged violates federal law and that the cited federal regulations are invalid. *See, e.g., Missouri Prot. & Advo. Servs. v. Missouri Dep't Mental Health,* 447 F.3d 1021 (8th Cir. 2006) (finding that interpretation of PAIMI set out in 42 C.F.R. § 51.41(c)(4) is unreasonable and that PAIMI preempts Missouri law in upholding district court's grant of summary judgment and injunction to DMH to disclose records); *Prot. and Advo. for Pers. with Disabilities v. Mental Health & Addiction Servs.,* 448 F.3d 119 (2d Cir. 2006) (finding that Congressional intent to give access to "all records" with PAIMI was clear and therefore finding it unnecessary to determine whether regulations were a permissible construction of the statute).

In sum, this action falls within the purview of *Ex parte Young*. The motion to dismiss on sovereign immunity grounds therefore will be denied.

c. Special State Sovereignty Interests

Defendants allege that the claim involves Virginia's "special sovereignty interests" which, according to Defendants, trumps the *Ex parte Young* exception and compels the Court to abstain from interfering. Defendants argue that, where there is a dispute between branches or agencies with a State's government or between a State and its political subdivisions, federal courts may not interfere. VOPA argues that Defendants are seeking to expand the concept beyond the limits established by the decisions of the Fourth Circuit.

VOPA is correct in asserting that special sovereignty interests are not at stake in this action. Cases in which a federal court should not interfere due to special sovereignty interests are those in which the federal court is called to adjudicate issues that are uniquely a state's concern, most commonly, the state's internal budgetary arrangements. *See Kelly v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 998, 989 (6th Cir. 1987) (deeming it inadvisable to adjudicate whether the tax burden for desegregation would fall on the state at large or individual school districts as "essentially an internal dispute between two local governmental entities," and finding suit independently barred as "one for the recovery of money from the state"); *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996) (declining "to determine the allocation of a state's financial resources"); *Harris v. Angelina County*, 31 F.3d 331, 338 (5th Cir. 1994) (declining to decide a claim for contribution

from a political subdivision of a state against the state itself).

In contrast, the Court here is being asked to adjudicate a violation of federal law that does not interfere with the prerogative of the State. Accordingly, it is appropriate to follow the Fourth Circuit's decision in *Antrican v. Odom* and allow the Complaint to proceed. 290 F.3d 178 (4th Cir. 2002). In *Antrican,* the Fourth Circuit found that a suit to enjoin compliance with the Medicaid Act was permissible under the Eleventh Amendment. Finding the Defendants' claim of "special sovereignty interests" inapplicable, the Court explained:

> This case, however, does not present a special sovereignty interest that would allow North Carolina to use its sovereign immunity shield to avoid an otherwise proper *Ex parte Young* action. Rather, it involves a federally designed healthcare program in which the federal government has invited the States to participate if they agree to certain federally established conditions. "A state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*."

Id. at 189 (citations omitted).

As in *Antrican,* this case involves a federally designed program for persons with disabilities and mental health issues in which the federal government

has invited the States to participate if they agree to certain federally established conditions. Defendants would have this Court refrain from deciding any cases brought by a state agency against another state agency. However, Defendants have cited no decision which supports such a broad rule. It is the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests. Indeed, many of the PAIMI cases cited by both sides were brought by the relevant state's protection and advocacy system, and obviously adjudicated despite the presence of state agencies on opposing sides. *See Missouri Prot. & Advo. Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Prot. & Advo. for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (stating that "OPA is a state-created agency").[3] No special sovereignty interests are implicated in this action that would compel this Court to abstain from adjudication, and the case may proceed.

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[3] While the agency status of a plaintiff likely would be relevant in a § 1983 action, which requires suit to be brought by a "person," that simply is not the case here because this action is not brought under § 1983. See *Virginia Office for Prot. and Advo. v. Reinhard*, 405 F.3d 185, 189-190 (4th Cir. 2005) (finding that VOPA, as a state agency, was not a "person" within the meaning of 42 U.S.C. § 1983, and hence had no standing to bring suit under that statutory provision).

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that the Renewed Motion to Dismiss (Docket No. 22) will be denied.

It is so ORDERED.

/s/ REP

Robert E. Payne
Senior United States
District Judge

APPENDIX C

FILED: July 30, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1845
(3:07-cv-00734-REP)

COMMONWEALTH OF VIRGINIA,
Virginia Office for Protection and Advocacy,

Plaintiff-Appellee

v.

JAMES REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services of the Commonwealth of Virginia; DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center; CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital,

Defendants-Appellants

NATIONAL DISABILITY RIGHTS NETWORK; SIX STATE PROTECTION AND ADVOCACY SYSTEMS, Constituted as Independent State Agencies,

Potential Amici Curiae

UNITED STATES OF AMERICA,

Amicus Supporting Appellant

ALABAMA DISABILITIES ADVOCACY PROGRAM; KENTUCKY PROTECTION AND ADVOCACY; MARYLAND DISABILITY LAW CENTER; NATIONAL DISABILITY RIGHTS NETWORK; OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, (Connecticut),

Amici Supporting Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Senior Circuit Judge Siler and Chief District Judge Conrad.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801 *et seq.*

§ 10801. Congressional findings and statement of purpose

(a) The Congress finds that –

(1) individuals with mental illness are vulnerable to abuse and serious injury;

(2) family members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family;

(3) individuals with mental illness are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and

(4) State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate.

(b) The purposes of this chapter are –

(1) to ensure that the rights of individuals with mental illness are protected; and

(2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will –

(A) protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

§ 10802. Definitions

For purposes of this subchapter:

* * *

(2) The term "eligible system" means the system established in a State to protect and advocate the rights of persons with developmental disabilities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000.

(3) The term "facilities" may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.

(4) The term "individual with mental illness" means, except as provided in section 10804(d) of this title, an individual –

(A) who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State; and

(B)(i)(I) who is an inpatient or resident in a facility rendering care or treatment, even if the whereabouts of such inpatient or resident are unknown;

(II) who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility; or" [sic];

(III) who is involuntarily confined in a municipal detention facility for reasons other than serving a sentence resulting from conviction for a criminal offense; or

(ii) who satisfies the requirements of sub-paragraph (A) and lives in a community setting, including their own home.

* * *

§ 10803. Allotments

The Secretary shall make allotments under this subchapter to eligible systems to establish and administer systems –

(1) which meet the requirements of section 10805 of this title; and

(2) which are designed to –

(A) protect and advocate the rights of individuals with mental illness; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

* * *

§ 10805. System requirements

(a) Authority; independent status; access to facilities and records; advisory council; annual report; grievance procedure

A system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall –

(1) have the authority to –

(A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(B) pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State; and

(C) pursue administrative, legal, and other remedies on behalf of an individual who –

(i) was a [sic] individual with mental illness; and

(ii) is a resident of the State,

but only with respect to matters which occur within 90 days after the date of the discharge of such individual from a facility providing care or treatment;

(2) be independent of any agency in the State which provides treatment or services (other than advocacy services) to individuals with mental illness;

(3) have access to facilities in the State providing care or treatment;

(4) in accordance with section 10806 of this title, have access to all records of –

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(B) any individual (including an individual who has died or whose whereabouts are unknown) –

(i) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a

complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever –

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual;

(5) have an arrangement with the Secretary and the agency of the State which administers the State plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] for the furnishing of the information required by subsection (b) of this section;

(6) establish an advisory council –

(A) which will advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness;

(B) which shall include attorneys, mental health professionals, individuals from the public

who are knowledgeable about mental illness, a provider of mental health services, individuals who have received or are receiving mental health services, and family members of such individuals, and at least 60 percent the membership of which shall be comprised of individuals who have received or are receiving mental health services or who are family members of such individuals; and

(C) which shall be chaired by an individual who has received or is receiving mental health services or who is a family member of such an individual;

(7) on January 1, 1987, and January 1 of each succeeding year, prepare and transmit to the Secretary and the head of the State mental health agency of the State in which the system is located a report describing the activities, accomplishments, and expenditures of the system during the most recently completed fiscal year, including a section prepared by the advisory council that describes the activities of the council and its assessment of the operations of the system;

(8) on an annual basis, provide the public with an opportunity to comment on the priorities established by, and the activities of, the system;

(9) establish a grievance procedure for clients or prospective clients of the system to assure that individuals with mental illness have full access to the services of the system and for individuals who have received or are receiving mental health services, family members of such individuals

with mental illness, or representatives of such individuals or family members to assure that the eligible system is operating in compliance with the provisions of this subchapter and subchapter III of this chapter; and

(10) not use allotments provided to a system in a manner inconsistent with section 14404 of this title.

(b) Annual survey report; plan of corrections

The Secretary and the agency of a State which administers its State plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] shall provide the eligible system of the State with a copy of each annual survey report and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act [42 U.S.C.A. §§ 1395 et seq. and 1396 et seq.] with respect to any facility rendering care or treatment to individuals with mental illness in the State in which such system is located. A report or plan shall be made available within 30 days after the completion of the report or plan.

(c) Governing authority

(1)(A) Each system established in a State, through allotments received under section 10803 of this title, to protect and advocate the rights of individuals with mental illness shall have a governing authority.

(B) In States in which the governing authority is organized as a private non-profit

entity with a multi-member governing board, or a public system with a multi-member governing board, such governing board shall be selected according to the policies and procedures of the system. The governing board shall be composed of –

(i) members (to be selected no later than October 1, 1990) who broadly represent or are knowledgeable about the needs of the clients served by the system; and

(ii) in the case of a governing authority organized as a private non-profit entity, members who broadly represent or are knowledgeable about the needs of the clients served by the system including the chairperson of the advisory council of such system.

As used in this subparagraph, the term "members who broadly represent or are knowledgeable about the needs of the clients served by the system" shall be construed to include individuals who have received or are receiving mental health services and family members of such individuals.

(2) The governing authority established under paragraph (1) shall –

(A) be responsible for the planning, design, implementation, and functioning of the system; and

(B) consistent with subparagraph (A), jointly develop the annual priorities of the system with the advisory council.

§ 10806. Access to records

(a) Confidentiality

An eligible system which, pursuant to section 10805(a)(4) of this title, has access to records which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services, shall, except as provided in subsection (b) of this section, maintain the confidentiality of such records to the same extent as is required of the provider of such services.

(b) Disclosure

(1) Except as provided in paragraph (2), an eligible system which has access to records pursuant to section 10805(a)(4) of this title may not disclose information from such records to the individual who is the subject of the information if the mental health professional responsible for supervising the provision of mental health services to such individual has provided the system with a written determination that disclosure of such information to such individual would be detrimental to such individual's health.

(2)(A) If disclosure of information has been denied under paragraph (1) to an individual –

(i) such individual;

(ii) the legal guardian, conservator, or other legal representative of such individual; or

(iii) an eligible system, acting on behalf of an individual described in subparagraph (B),

may select another mental health professional to review such information and to determine if disclosure of such information would be detrimental to such individual's health. If such mental health professional determines, based on professional judgment, that disclosure of such information would not be detrimental to the health of such individual, the system may disclose such information to such individual.

(B) An eligible system may select a mental health professional under subparagraph (A)(iii) on behalf of –

(i) an individual whose legal guardian is the State; or

(ii) an individual who has a legal guardian, conservator, or other legal representative other than the State if such guardian, conservator, or representative does not, within a reasonable time after such individual is denied access to information under paragraph (1), select a mental health professional under subparagraph (A) to review such information.

(C) If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before –

(i) the date such system is no longer subject to such a prohibition; or

(ii) the expiration of the 2-year period beginning on May 23, 1986,

whichever occurs first.

(3)(A) As used in this section, the term "records" includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

(B) An eligible system shall have access to the type of records described in subparagraph (A) in accordance with the provisions of subsection (a) of this section and paragraphs (1) and (2) of subsection (b) of this section.

§ 10807. Legal actions

(a) Administrative remedies

Prior to instituting any legal action in a Federal or State court on behalf of a [sic] individual with mental illness, an eligible system, or a State agency or nonprofit organization which entered into a contract with an eligible system under section 10804(a) of this title, shall exhaust in a timely manner all administrative remedies where appropriate. If, in pursuing administrative remedies, the system, agency, or organization determines that any matter with respect to such individual will not be resolved within a

reasonable time, the system, agency, or organization may pursue alternative remedies, including the initiation of a legal action.

(b) Exception

Subsection (a) of this section does not apply to any legal action instituted to prevent or eliminate imminent serious harm to a [sic] individual with mental illness.

Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15001 *et seq.*,

§ 15041. Purpose

The purpose of this part is to provide for allotments to support a protection and advocacy system (referred to in this part as a "system") in each State to protect the legal and human rights of individuals with developmental disabilities in accordance with this part.

* * *

§ 15043 System required

(a) System required

In order for a State to receive an allotment under part B of this subchapter or this part –

> **(1)** the State shall have in effect a system to protect and advocate the rights of individuals with developmental disabilities;

(2) such system shall –

(A) have the authority to –

(i) pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic and racial minority groups; and

(ii) provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities;

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(C) on an annual basis, develop, submit to the Secretary, and take action with regard to goals (each of which is related to 1 or more areas of emphasis) and priorities, developed through data driven strategic planning, for the system's activities;

(D) on an annual basis, provide to the public, including individuals with developmental disabilities attributable to either physical impairment, mental impairment, or a combination of physical and mental impairment, and

their representatives, and as appropriate, non-State agency representatives of the State Councils on Developmental Disabilities, and Centers, in the State, an opportunity to comment on –

(i) the goals and priorities established by the system and the rationale for the establishment of such goals; and

(ii) the activities of the system, including the coordination of services with the entities carrying out advocacy programs under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.), and the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.), and with entities carrying out other related programs, including the parent training and information centers funded under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), and activities authorized under section 3003 or 3004 of Title 29;

(E) establish a grievance procedure for clients or prospective clients of the system to ensure that individuals with developmental disabilities have full access to services of the system;

(F) not be administered by the State Council on Developmental Disabilities;

(G) be independent of any agency that provides treatment, services, or habilitation to individuals with developmental disabilities;

(H) have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part;

(I) have access to all records of –

(i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(ii) any individual with a developmental disability, in a situation in which –

(I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable

cause to believe that such individual has been subject to abuse or neglect; and

(iii) any individual with a developmental disability, in a situation in which –

(I) the individual has a legal guardian, conservator, or other legal representative;

(II) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect;

(III) such representative has been contacted by such system, upon receipt of the name and address of such representative;

(IV) such system has offered assistance to such representative to resolve the situation; and

(V) such representative has failed or refused to act on behalf of the individual;

(J)(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the system makes a written request for the records involved; and

(ii) have immediate access, not later than 24 hours after the system makes such a request, to the records without consent from another party, in a situation in which services, supports, and other assistance are provided to an individual with a developmental disability –

(I) if the system determines there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy; or

(II) in any case of death of an individual with a developmental disability;

(K) hire and maintain sufficient numbers and types of staff (qualified by training and experience) to carry out such system's functions, except that the State involved shall not apply hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system under this part;

(L) have the authority to educate policy-makers; and

(M) provide assurances to the Secretary that funds allotted to the State under section 15042 of this title will be used to supplement, and not supplant, the non-Federal funds that would otherwise be made available for the purposes for which the allotted funds are provided;

(3) to the extent that information is available, the State shall provide to the system –

(A) a copy of each independent review, pursuant to section 1396a(a)(30)(C) of this title, of an Intermediate Care Facility (Mental Retardation) within the State, not later than 30 days after the availability of such a review; and

(B) information about the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities who are served through home and community-based waivers (authorized under section 1396n(c) of this title) receive; and

(4) The agency implementing the system shall not be redesignated unless –

(A) there is good cause for the redesignation;

(B) the State has given the agency notice of the intention to make such redesignation, including notice regarding the good cause for such redesignation, and given the agency an opportunity to respond to the assertion that good cause has been shown;

(C) the State has given timely notice and an opportunity for public comment in an accessible format to individuals with developmental disabilities or their representatives; and

(D) the system has an opportunity to appeal the redesignation to the Secretary, on the

basis that the redesignation was not for good cause.

* * *

(c) Record

In this section, the term "record" includes –

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

§ 15044. Administration

(a) Governing board

In a State in which the system described in section 15043 of this title is organized as a private nonprofit entity with a multimember governing board, or a public system with a multimember governing board, such governing board shall be selected according to the policies and procedures of the system, except that –

(1)(A) the governing board shall be composed of members who broadly represent or are

knowledgeable about the needs of the individuals served by the system;

(B) a majority of the members of the board shall be –

(i) individuals with disabilities, including individuals with developmental disabilities, who are eligible for services, or have received or are receiving services through the system; or

(ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i); and

(C) the board may include a representative of the State Council on Developmental Disabilities, the Centers in the State, and the self-advocacy organization described in section 15024(c)(4)(A)(ii)(I) of this title;

(2) not more than ⅓ of the members of the governing board may be appointed by the chief executive officer of the State involved, in the case of any State in which such officer has the authority to appoint members of the board;

(3) the membership of the governing board shall be subject to term limits set by the system to ensure rotating membership;

(4) any vacancy in the board shall be filled not later than 60 days after the date on which the vacancy occurs; and

(5) in a State in which the system is organized as a public system without a multimember

governing or advisory board, the system shall establish an advisory council –

(A) that shall advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with developmental disabilities; and

(B) on which a majority of the members shall be –

(i) individuals with developmental disabilities who are eligible for services, or have received or are receiving services, through the system; or

(ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i).

(b) Legal action

(1) In general

Nothing in this subchapter shall preclude a system from bringing a suit on behalf of individuals with developmental disabilities against a State, or an agency or instrumentality of a State.

(2) Use of amounts from judgment

An amount received pursuant to a suit described in paragraph (1) through a court judgment may only be used by the system to further the purpose of this part and shall not be used to augment payments to legal contractors or to award personal bonuses.

(3) Limitation

The system shall use assistance provided under this part in a manner consistent with section 14404 of this title.

(c) Disclosure of information

For purposes of any periodic audit, report, or evaluation required under this part, the Secretary shall not require an entity carrying out a program to disclose the identity of, or any other personally identifiable information related to, any individual requesting assistance under such program.

(d) Public notice of Federal onsite review

The Secretary shall provide advance public notice of any Federal programmatic or administrative onsite review of a system conducted under this part and solicit public comment on the system through such notice. The Secretary shall prepare an onsite visit report containing the results of such review, which shall be distributed to the Governor of the State and to other interested public and private parties. The comments received in response to the public comment solicitation notice shall be included in the onsite visit report.

(e) Reports

Beginning in fiscal year 2002, each system established in a State pursuant to this part shall annually prepare and transmit to the Secretary a report that describes the activities, accomplishments,

and expenditures of the system during the preceding fiscal year, including a description of the system's goals, the extent to which the goals were achieved, barriers to their achievement, the process used to obtain public input, the nature of such input, and how such input was used.

Code of Virginia

§ 2.2-510. Employment of special counsel generally.

No special counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of any circuit court or district court except in the following cases:

1. When the Governor determines that, because of the nature of the legal service to be performed, the Attorney General's office is unable to render such service, then the Governor shall issue an exemption order stating with particularity the facts and reasons leading to the conclusion that the Attorney General's office is unable to render such service. The Governor may then employ special counsel to render such service as he may deem necessary and proper. The compensation for such special counsel shall be paid out of the funds appropriated for the administration of the board, commission, division, or department to be represented or whose members, officers,

inspectors, investigators, or other employees are to be represented pursuant to this section.

2. In cases of legal services in civil matters to be performed for the Commonwealth, where it is impracticable or uneconomical for the Attorney General to render such service, he may employ special counsel whose compensation shall be paid out of the appropriation for the Attorney General's office.

3. In cases of legal services in civil matters to be performed for any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of any circuit court or district court where it is impracticable or uneconomical for the Attorney General's office to render such service, special counsel may be employed but only as set forth in subsection C of § 2.2-507, upon the written recommendation of the Attorney General, who shall approve all requisitions drawn upon the Comptroller for warrants as compensation for such special counsel before the Comptroller shall have authority to issue such warrants.

4. In cases where the Attorney General certifies to the Governor that it would be improper for the Attorney General's office to render legal services due to a conflict of interests, or that he is unable to render certain legal services, the Governor may employ special counsel or other assistance to render such services as may be necessary.

5. In cases of legal services in civil matters to be performed by the Virginia Office for Protection and

Advocacy pursuant to Chapter 8.1 (§ 51.5-39.1 et seq.) of Title 51.5.

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§ 51.5-39.2. The Virginia Office for Protection and Advocacy; governing board; terms; quorum; expenses; summary of annual work.

A. The Department for Rights of Virginians with Disabilities is hereby established as an independent state agency to be known as the Virginia Office for Protection and Advocacy. The Office is designated as the agency to protect and advocate for the rights of persons with mental, cognitive, sensory, physical or other disabilities and to receive federal funds on behalf of the Commonwealth of Virginia to implement the federal Protection and Advocacy for Individuals with Mental Illness Act, the federal Developmental Disabilities Assistance and Bill of Rights Act, the federal Rehabilitation Act, the Virginians with Disabilities Act and such other related programs as may be established by state and federal law. Notwithstanding any other provision of law, the Office shall be independent of the Office of the Attorney General and shall have the authority, pursuant to subdivision 5 of § 2.2-510, to employ and contract with legal counsel to carry out the purposes of this chapter and to employ and contract with legal counsel to advise and represent the Office, to initiate actions on behalf of the Office, and to defend the Office and its officers, agents and employees in the

course and scope of their employment or authorization, in any matter, including state, federal and administrative proceedings. Compensation for legal counsel shall be paid out of the funds appropriated for the administration of the Office. However, in the event defense is provided under Article 5 (§ 2.2-1832 et seq.) of Chapter 18 of Title 2.2, counsel shall be appointed pursuant to subdivision 4 of § 2.2-510. The Office shall provide ombudsman, advocacy and legal services to persons with disabilities who may be represented by the Office. The Office is authorized to receive and act upon complaints concerning discrimination on the basis of disability, abuse and neglect or other denial of rights, and practices and conditions in institutions, hospitals, and programs for persons with disabilities, and to investigate complaints relating to abuse and neglect or other violation of the rights of persons with disabilities in proceedings under state or federal law, and to initiate any proceedings to secure the rights of such persons.

B. The Office shall be governed by an 11-member board consisting of 11 nonlegislative citizen members. The members shall be appointed as follows: five citizens at large, of whom one shall be a person with a developmental disability or the parent, family member, guardian, advocate, or authorized representative of such an individual, one shall be a person with a physical disability or the parent, family member, guardian, advocate, or authorized representative of such an individual, one shall be a person who represents persons with cognitive disabilities,

one shall be a person who represents persons with developmental disabilities, and one shall be a person who represents persons with sensory or physical disabilities, to be appointed by the Speaker of the House of Delegates; three citizens at large, of whom one shall be a person with a cognitive disability or the parent, family member, guardian, advocate, or authorized representative of such an individual, one shall be a person who represents persons with mental illnesses, and one shall be a person who represents people with mental or neurological disabilities, to be appointed by the Senate Committee on Rules; and three citizens at large, of whom one shall be a person with a mental illness or the parent, family member, guardian, advocate, or authorized representative of such an individual, one shall be a person with a sensory disability or the parent, family member, guardian, advocate, or authorized representative of such an individual, and one shall be a person with a mental or neurological disability or the parent, family member, guardian, advocate, or authorized representative of such an individual, to be appointed by the Governor. Persons appointed to the board to represent individuals with a disability shall be knowledgeable of the broad range of needs of such persons served by the Office. Persons appointed to the board who have a disability shall be individuals who are eligible for, are receiving, or have received services through the state system that protects and advocates for the rights of individuals with disabilities. In appointing the members of the Board, consideration shall be given to persons nominated by

statewide groups that advocate for the physically, developmentally, and mentally disabled. The Virginia Office for Protection and Advocacy shall coordinate and provide to the appointing authorities the lists of nominations for each appointment. The Speaker of the House of Delegates, the Senate Committee on Rules and the Governor shall not be limited in their appointments to persons so nominated; however, such appointing authorities shall seriously consider the persons nominated and appoint such persons whenever feasible.

No member of the General Assembly, elected official, or current employee of the Department of Behavioral Health and Developmental Services, State Health Department, Department of Rehabilitative Services, Department for the Blind and Vision Impaired, Virginia Department for the Deaf and Hard-of-Hearing, a community services board, a behavioral health authority, or a local government department with a policy-advisory community services board shall be appointed to the Board.

* * *

F. Members of the Board shall be subject to removal from office only as set forth in Article 7 (§ 24.2-230 et seq.) of Chapter 2 of Title 24.2. The Circuit Court of the City of Richmond shall have exclusive jurisdiction over all proceedings for such removal.

§ 51.5-39.4. Powers and duties of the Office.

The Office shall have the following powers and duties:

1. To monitor the implementation of Chapter 9 (§ 51.5-40 et seq.) of this title and to render assistance to persons with disabilities in the protection of their rights under the laws of the Commonwealth and of the United States.

2. To exhaust in a timely manner all appropriate administrative remedies to resolve complaints concerning violations of rights of persons with disabilities, when those rights are related to such disabilities. When such procedures fail or if, in pursuing administrative remedies, the Office determines that any matter with respect to an individual with a disability will not be resolved in a reasonable time, the Office shall have the authority to pursue legal and other alternative remedies to protect the rights of such persons.

3. To access facilities, institutions, and providers, as defined in §§ 37.2400 and 37.2403, and all other facilities and institutions that provide care or treatment to individuals with disabilities. Reasonable access shall be granted for the purposes of conducting investigations of allegations of abuse and neglect, and performing such other activities as necessary to monitor the care and treatment provided to, and to protect the rights of, individuals with disabilities.

4. To access records of facilities, institutions, and providers, as defined in §§ 37.2-100 and 37.2-403, and all other facilities and institutions that provide care or treatment to individuals with disabilities regarding the commitment, care, treatment, and habilitation of such individuals, unless the disclosure of such records is specifically prohibited by federal law. Records that are confidential under federal or state law shall be maintained as confidential by the Office and shall not be further disclosed, except as permitted by law. However, there shall be no right of access to privileged communications pursuant to § 8.01-581.17.

5. To access, for the purposes of inspection and copying, the records of an individual with a disability (a) who by reason of his mental or physical condition is unable to authorize the Office to have such access; (b) who does not have a legal guardian or for whom the Commonwealth, or designee of the Commonwealth, is the legal guardian; and (c) with respect to whom a complaint has been received by the Office or with respect to whom there is probable cause to believe that such person has been subjected to abuse or neglect. The director of the facility or institution shall disclose the name, address, and telephone number of any legal guardian or authorized representative.

§ 51.5-39.5. Powers and duties of the Board; Protection and Advocacy Fund.

* * *

B. There is hereby created in the state treasury a special nonreverting fund to be known as the Protection and Advocacy Fund, hereinafter referred to as "the Fund," to be administered by the Board. The Fund shall be established on the books of the Comptroller. The Fund shall consist of (i) gifts, donations, grants, and bequests on behalf of the Office from the United States government and agencies and instrumentalities thereof; (ii) such other funds as may be appropriated by the General Assembly from time to time and designated for this Fund; (iii) funds from any other source; and (iv) all interest, dividends and appreciation that may accrue thereto. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes set forth in this chapter. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Director of the Office or his designee. The total costs for the operation and administration of the Office shall be funded from the Fund and shall be in such amount as provided in the general appropriation act.

The Board shall have the authority to apply for and accept, gifts, donations, grants, and bequests on

behalf of the Office from the United States government and agencies and instrumentalities thereof and from any other source and to deposit all moneys received in the Protection and Advocacy Fund created pursuant to this subsection. To these ends, the Board shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient or desirable, consistent with policies, rules, and regulations of the Board.

§ 51.5-39.6. Powers and duties of the Director.

The Director shall have the following powers and duties:

* * *

3. To make and enter into all contracts and agreements, subject to ratification by the Board, necessary or incidental to the performance of the Office's duties and the execution of its powers under this chapter, including but not limited to contracts with the United States, other states, and agencies and political subdivisions of the Commonwealth, consistent with policies and regulations of the Board;

* * *

APPENDIX E

No. 08-1845

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE OF PROTECTION AND ADVOCACY,

Plaintiff-Appellee,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

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* * *

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States respectfully submits this *amicus* brief in support of rehearing *en banc*.

This case presents a question of exceptional importance to the enforcement of federal statutes designed to protect individuals with disabilities from abuse and neglect. The Developmental Disabilities Assistance and Bill of Rights Act ("DD Act") and the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act") provide federal funding for states to establish entities – either state agencies or private non-profit entities – to protect and advocate on behalf of persons with developmental disabilities or mental illness. The federal statutes grant these entities, known as "protection and advocacy (P&A) systems," various powers and rights, including specified rights of access to records relevant to an investigation into incidents of abuse or neglect. The statutes require that P&A systems be independent of

other state agencies and that they have authority to pursue legal remedies.

Virginia elected to participate in these federal programs and designated a state agency, the Virginia Office of Protection & Advocacy ("VOPA"), to serve as its P&A system. In this lawsuit, VOPA is seeking records relevant to its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of state-run institutions. VOPA alleges that the defendant state officials are denying VOPA access to the records in violation of the DD and PAIMI Acts and seeks prospective relief.

It is conceded that this action could proceed if VOPA were a private P&A system. Op.13. Under the *Ex parte Young* doctrine, a suit against a state official that alleges a violation of federal law and seeks prospective relief does not implicate the sovereign immunity of the state. To determine whether *Ex parte Young* applies, the Supreme Court has established a "straightforward inquiry" that turns on the relief sought in the complaint. *Verizon Md., Inc, v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).

The panel declined to apply the Supreme Court's "straightforward inquiry" because VOPA is a state agency. That departure creates a conflict with decisions of other circuits and overlooks the historical rationale for the *Ex parte Young* doctrine, which is that a state official acting in violation of federal law is stripped of his official capacity and cannot invoke the

immunity of the state. The rationale for the doctrine turns on the nature of the relief sought in the complaint and does not depend on the identity of the plaintiff. Accordingly, other courts of appeals consistently have allowed suits by P&A systems to proceed in federal court without regard to whether the system was a state agency or a private non-profit.

If allowed to stand, the panel decision would undermine the crucial protections established by the DD and PAIMI Acts. The federal P&A programs were prompted by "inhumane and despicable conditions" in a state-run institution and were carefully designed to protect individuals from abuse and neglect in the hands of state custodians. *Alabama Disabilities Advocacy Protection v. J.S. Tarwater Developmental Center*, et al., 97 F.3d 492, 494 (11th Cir. 1996). The purpose of the federal programs was to establish entities with the capacity to protect the rights, including federal constitutional rights, of individuals who by virtue of their disabilities are unable to protect themselves. *Id.* at 494-495. Under the panel's ruling, by contrast, a state can accept federal funds under these federal programs yet evade federal court enforcement simply by designating a state agency to serve as its P&A system. The decision is without anchor in the governing precedent and compromises vital federal protections for especially vulnerable individuals. The case should be reheard *en banc*.

STATEMENT

A. Statutory Background

Since the mid-1970's, Congress has authorized funding for protection and advocacy systems established by states to protect individuals with disabilities from abuse and neglect. The first P&A program was created in 1975, after public reports exposed deplorable conditions at a New York state institution for persons with mental retardation. *See* Pub. L. No. 94-103, § 203 (1975); S. Rep. No. 93-1297 (1974), 1974 U.S.C.C.A.N. 6373, 6408-6409. Congress reauthorized the program in 2000 as part of the Developmental Disabilities Assistance and Bill of Rights Act, a statute known as the "DD Act." 42 U.S.C. § 15001 *et seq.*

Similar concerns about the abuse and neglect of individuals in mental health facilities led to enactment of the Protection and Advocacy for Individuals with Mental Illness Act, known as the "PAIMI Act," in 1986. That statute authorizes additional funding for the same P&A systems established pursuant to the DD Act. *See* Pub. L. No. 99-319 (1986), 42 U.S.C. §§ 10801-10851. Congress also enacted several other statutes that provide additional funding for the same P&A systems.[1]

---

[1] *See* 29 U.S.C. § 794e (funding for P&A systems to serve persons with disabilities not eligible under previously established P&A programs); 29 U.S.C. § 3004 (funding for P&A systems to assist individuals with disabilities in obtaining

(Continued on following page)

A state that chooses to participate in these federal spending programs has the option to designate either a state agency or a private nonprofit to serve as its P&A system. *See* 42 U.S.C. §§ 15044(a), 10805(c)(1)(B). In either case, the P&A system must be independent of any state agency that provides treatment or services, *id.* §§ 15043(a)(2)(G), 10805(a)(2), and must have authority to pursue legal remedies. *Id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B). The federal statutes grant P&A systems various investigatory powers, including the right to gain access to records relevant to an investigation under conditions specified by the statutes. *Id.* §§ 15043(a)(2)(I) & (c), 10805(a)(4), 10806.

B. Facts and Prior Proceedings

Virginia has elected to participate in these federal spending programs. It chose to establish its P&A system as a state agency now known as the Virginia Office for Protection and Advocacy ("VOPA"). *See* Va. Code Ann. § 51.5-39.2. As required by federal law, VOPA is independent of the state Attorney General's office and has authority to investigate and initiate

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assistive technologies); 42 U.S.C. § 1320b-21 (funding for P&A systems to assist beneficiaries of Social Security to secure or regain employment); 42 U.S.C. § 300d-53 (funding for P&A systems to serve individuals with traumatic brain injury); 42 U.S.C. § 15461 (funding for P&A systems to assist individuals with disabilities in the electoral process, through means other than litigation).

legal proceedings in response to allegations of abuse and neglect. *Ibid.* § 51.5-39.2(A).

VOPA filed this action in federal district court against three state officials, seeking records in connection with its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of institutions operated by the State of Virginia. VOPA alleged that it was entitled to the records under the DD and PAIMI Acts and sought declaratory and injunctive relief.

The state officials moved to dismiss, contending, *inter alia*, that they were immune from suit under the Eleventh Amendment. The district court denied the motion, explaining that under the *Ex parte Young* doctrine, the suit does not implicate sovereign immunity because it "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *VOPA v. Reinhard*, 2008 WL 2795940, at *5 (E.D. Va. 2008) (quoting *Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (internal quotations omitted)).

On defendants' interlocutory appeal, a panel of this Court reversed. The panel acknowledged that this lawsuit could proceed under the "straightforward inquiry" set out by the Supreme Court in *Verizon* – an inquiry that turns on the nature of the relief sought in the complaint. Op.11. Nonetheless, the panel declined to follow *Verizon* because VOPA is a state agency. *See* Op.15. It held that a state P&A system

may enforce the DD and PAIMI Acts against state officials only in state court and only as permitted by state law. *See* Op.20 (stating that VOPA's only remedy is to seek a writ of mandamus in the Virginia Supreme Court).

ARGUMENT

The panel failed to apply the *Ex parte Young* framework set out by the Supreme Court and created a conflict with decisions of other courts of appeals. The decision threatens to undermine the enforcement of federal laws designed to protect the health and safety of individuals with developmental disabilities or mental illness. The case should be reheard *en banc*.

1. The *Ex parte Young* doctrine is a century-old doctrine that ensures the supremacy of federal law. In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that a state officer acting contrary to federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160. In such circumstances, "[t]he state has no power to impart to [its officer] any immunity from responsibility to the supreme authority of the United States." *Ibid.* Accordingly, the state officer cannot invoke the immunity of the state. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

The availability of the *Ex parte Young* doctrine turns on the nature of the relief sought against the

state officials. Only prospective relief is available; the doctrine does not permit an action for money damages. In an action for money damages, "the state is the real, substantial party in interest and is allowed to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Edelman v. Jordan*, 415 U.S. 651, 653, 663 (1974).

Applying these principles, the Supreme Court set out a "straightforward inquiry" to be used in determining whether the *Ex parte Young* doctrine applies. Writing for the Court, Justice Scalia explained:

> In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

Verizon, 535 U.S. at 645 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)). The Supreme Court held that Verizon's "prayer for injunctive relief – that state officials be restrained from enforcing an order in contravention of controlling federal law – clearly satisfies our 'straightforward inquiry.'" *Id.* at 645. Reversing a decision of this Court, the Supreme Court explained that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 646. "'An *allegation* of an ongoing violation of federal law . . . is ordinarily

sufficient." *Ibid.* (quoting *Coeur d'Alene*, 521 U.S. at 281).

2. As the panel acknowledged, VOPA's complaint satisfies the "straightforward inquiry" set out in *Verizon* because VOPA alleges a violation of federal law and seeks prospective relief. Op.11. Thus, the panel recognized that this suit could proceed if VOPA were a private P&A system. Op.13. Nonetheless, the panel declined to follow *Verizon* because VOPA is a state agency.

That approach overlooks the historical rationale for the *Ex parte Young* doctrine, which is that a state official acting contrary to federal law is "stripped of his official or representative character" and cannot invoke the immunity of the state. *Ex parte Young*, 209 U.S. at 160. That rationale depends on the nature of the relief sought in the complaint – not on the identity of the plaintiff. A suit that alleges a violation of federal law and seeks prospective relief simply does not implicate the immunity of the state. *Pennhurst*, 465 U.S. at 102. Accordingly, no abrogation or waiver of sovereign immunity is needed.

Consistent with these settled principles, federal courts have enforced the DD and PAIMI Acts in suits against state officials, without regard to whether the plaintiff P&A system was a public agency or a private non-profit. *See, e.g.*, *Alabama Disabilities Advocacy Protection v. J.S. Tarwater Developmental Center*, et al., 97 F.3d 492 (11th Cir. 1996) (public P&A system); *Connecticut Office of Protection & Advocacy for*

Persons with Disabilities v. Commissioner, Connecticut Dept of Mental Health & Addiction Services, 448 F.3d 119 (2d Cir. 2006) (public P&A system); *Missouri Protection & Advocacy Services v. Missouri Dep't of Health*, 447 F.3d 1021 (8th Cir. 2006) (non-profit P&A system); *Disability Rights Wisc., Inc. v. Wisc. Dep't of Public Instruction*, 463 F.3d 719 (7th Cir. 2006) (non-profit P&A system). The panel noted that sovereign immunity was not addressed in prior suits. Op.12 n.1. Until now, however, no state ever contended that it could accept federal funds yet evade federal court enforcement by designating a state agency to serve as its P&A system.

3. The Supreme Court cases cited by the panel provide no justification for its departure from the *Verizon* framework or from the uniform circuit precedent.

In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the plaintiff brought "the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." *Id.* at 282. Given the potential impact on the state's "sovereign interest in its lands and waters," the Supreme Court concluded that relief would be "as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287. "Under these particular and special circumstances," the Court found *Ex parte Young* inapplicable. *Ibid.*

As the courts of appeals – including this Court – have recognized, it was the "unique nature of the tribe's claims and the relief it requested [that] led the Court ultimately to conclude that the tribe's suit was in essence a suit against the state itself." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1047 (9th Cir. 2000). As this Court explained, "the *Young* rule did not apply because the Tribe's suit was not really a suit to enjoin state officials from an ongoing violation of federal law." *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 205 (4th Cir. 2001). "Rather, it was the 'functional equivalent' of a suit against the State of Idaho itself because it sought to dispossess the State from land within its borders and to remove that land from the State's regulatory authority." *Ibid.*

Contrary to the panel's assumption, *Coeur d'Alene* did not inject a free-wheeling "special sovereignty interest" factor into the analysis as to whether *Ex parte Young* is available. If there were any doubt on that score, it was removed by *Verizon*, which adopted the "straightforward inquiry" set out in the *Coeur d'Alene* concurrence. *See Verizon*, 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment). Thus, the Tenth Circuit expressly rejected the mode of analysis employed by the panel here in a case that, like this case, was brought by a state agency: "[T]o the extent that our [earlier decision] read *Coeur d'Alene* as requiring federal courts [to] examine whether the relief sought against

a state official implicates special sovereignty interests, we recognize today that *Verizon Maryland* abrogated this step." *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (quotation marks and citations omitted).

The other Supreme Court decisions cited by the panel are wholly inapposite. In *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984), the Supreme Court held that the *Ex parte Young* doctrine does not apply in a suit alleging a violation of *state* law. The Court explained that "[i]n such a case the entire basis for the doctrine of *Young* . . . disappears" because a "federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law." *Id.* at 106. Here, by contrast, VOPA alleges a violation of *federal* law. Thus, the defendant officials "concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." Op.13.

In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that Congress lacks the power under Article I to abrogate a state's immunity from damages actions in state court. *Id.* at 712. By contrast, this suit is not a damages action and no abrogation of immunity is required. The panel's suggestion that this suit threatens to "commandeer the entire political machinery of the State against its will," Op.15 (quoting *Alden*, 527 U.S. at 749), is difficult to comprehend. No state is required to accept

funds under the DD and PAIMI Acts and no state is required to designate a state agency to serve as its P&A system. If – for reasons unknown – a state perceives a suit by its own agency as an affront to its dignity, *see* Op.14, it is free to designate a non-profit to serve as its P&A system. Plainly, it cannot evade federal court enforcement by opting for a state P&A system.

As the panel acknowledged, the *Hunter* line of cases did not involve sovereign immunity. Op.17-18. Instead, those cases addressed the ability of municipalities to sue their states under provisions of the federal Constitution. For example, in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), residents of the city of Allegheny challenged a state law under which Allegheny was to be annexed into the city of Pittsburgh. Rejecting the challenge, the Supreme Court explained that the powers of municipalities rest "in the absolute discretion of the state," which "at its pleasure, may modify or withdraw all such powers." *Id.* at 178. The Supreme Court cautioned against a broad reading of the *Hunter* line, noting that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases." *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960).

The *Hunter* line has no application here because VOPA's independence and investigatory powers are required as a matter of *federal* law. That independence is crucial to ensuring that the P&A system are effective in investigating abuse and neglect by state custodians – the original impetus for the P&A programs. *Tarwater*, 97 F.3d at 494. Virginia's contention that it may accept federal funds under these federal programs yet evade federal court enforcement by designating a Virginia agency to serve as its P&A system is flatly at odds with the purpose of the federal statutes and the governing precedent.

* * *

In short, the panel decision is without anchor in Supreme Court precedent and creates an artificial distinction between state-run and privately-operated P&A systems. This distinction bears no relationship to the origins of the *Ex parte Young* doctrine, which was intended to prevent ongoing state violations of federal law and to permit federal court actions that seek prospective relief. The decision creates a conflict with decisions of other circuits and undermines vital federal protections for vulnerable individuals who are unable to protect themselves. The case should be reheard *en banc*.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Respectfully submitted,

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July 2009

OPPOSITION BRIEF

SUPREME COURT, U.S.
FILED
DEC 18 2009
OFFICE OF THE CLERK

No. 09-529

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petition involves a suit by one Virginia state agency—the Virginia Office for Protection and Advocacy—against Virginia state officials at another state agency. Although it is undisputed that the state agency may obtain relief in state court, the state agency chose to sue in federal court. The Fourth Circuit held that sovereign immunity precluded the suit. The question presented is:

> May a state agency invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against state officials from the same State?

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Virginia Attorney General William C. Mims, on behalf of James S. Reinhard, in his official capacity as the Commissioner of the Virginia Department of Behavioral Health and Developmental Services, Denise D. Micheletti, in her official capacity as the Director of Central Virginia Training Center, and Charles M. Davis, in his official capacity as Director of Central State Hospital (collectively "Virginia Officials"), submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

The Petition involves a novel and narrow question—may a state agency invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against state officials from the same State? As the Fourth Circuit noted, "[the Petitioner] has cited no case, nor have we found any, holding that—or even analyzing whether—the *Ex parte Young* doctrine applies equally when the plaintiff is a state agency." *Pet. App.* 14a-15a. Because "the interest of the states in avoiding excessive federal meddling with their internal authority is well recognized in [this] Court's sovereign immunity jurisprudence," *Pet. App.* 18a, the court of appeals "decline[d] to expand the doctrine of *Ex parte Young* . . . to lift the bar of sovereign

[1] On November 5, 2009, this Court extended the time for filing a response to December 28, 2009.

immunity in federal court when the plaintiff is a state agency." *Pet. App.* 3a. While the Petitioner "may pursue its claims in state court, . . . it would be inconsistent with our system of dual sovereignty for a federal court to rely on *Ex parte Young* to adjudicate an intramural state dispute like this one." *Pet. App.* 3a.

This Court should decline review for three reasons. First, there is no conflict among the lower courts. Second, the Fourth Circuit's decision is fully consistent with this Court's jurisprudence. Third, the Petitioner may pursue its federal law claims in the Virginia courts.

STATEMENT OF THE CASE

1. The Petitioner, the Virginia Office for Protection and Advocacy ("VOPA"), "is an *independent Virginia state agency* that serves as the Commonwealth's [protection and advocacy agency]." *Virginia Office for Prot. & Advocacy v. Reinhard*, 405 F.3d 185, 187 (4th Cir. 2005) (emphasis added). *See also Virginia Code* §§ 51.5-39.2 – 51.5-39.12 (statutory establishment of VOPA). Congress encourages the states to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of the Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("PAIMI Act"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of

Rights Act ("DD Act"), 42 U.S.C. §§ 15001-15115. Under these acts, States may choose to make their protection and advocacy systems either state agencies or private, nonprofit entities. *See* 42 U.S.C. §§ 15044(a), 10805(c)(1)(B). *See also* 45 C.F.R. § 1386.20. Although most States have chosen the private option, Virginia chose to create a state agency.

All of the Respondents are state officials with another Virginia state agency. Commissioner Reinhard is the head of the Department of Behavioral Health and Developmental Services ("Department"). Among other things, this Department has responsibility for operating sixteen state facilities throughout Virginia that provide twenty-four hour per day care for persons with mental illness and mental retardation and individuals committed as sexually violent predators. *See Virginia Code* § 37.2-304. Director Micheletti is the head of the Department's Central Virginia Training Center, a facility that provides care, training, and rehabilitation services to persons with mental retardation. Director Davis is the head of the Department's Central State Hospital, a psychiatric facility.

2. Consistent with federal law, VOPA has the authority to engage in various pursuits on behalf of individuals with mental illness and other disabilities, such as investigating complaints of discrimination, abuse, and neglect. *Virginia Code* § 51.5-39.4(5). *See also* 42 U.S.C. §§ 15043(a)(2)(I)-(J), 10805(a)(4). As part of its investigation into the death or serious injuries of three persons in facilities operated by the

Department, VOPA has requested certain "peer review" records. VOPA believes that the PAIMI Act and the DD Act require the Virginia Officials to produce the records.

The Virginia Officials disagree. Two federal regulations, 42 C.F.R. § 51.41(c)(4)[2] and 45 C.F.R. § 1386.22(c)(1),[3] explicitly exempt peer review

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[2] This federal regulation, which implements the PAIMI Act, provides, in pertinent part:

> (c) Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to the P&A system under the Act shall include, but not be limited to:
>
> (4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

42 C.F.R. § 51.41(c)(4) (emphasis added).

[3] This federal regulation, which implements the DD Act provides in pertinent part:

> (c) Information in the possession of a facility which must be available to P&A systems in investigating instances of abuse and neglect under section 142(a)(2)(B) (whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records) shall include, but not be limited to:

(Continued on following page)

materials from disclosure if such records are privileged under state law.[4] Because Virginia has a state law protecting the disclosure of peer review material, *Virginia Code* §§ 8.01-581.16 and 581.17, and a state law that specifically prohibits VOPA from obtaining these records, *Virginia Code* § 51.5-39.4(4), these federal regulations allow the Virginia Officials to refuse to disclose the materials. Moreover, regardless of its general authority to investigate allegations of abuse or neglect, VOPA has no authority to ask the Virginia Officials to disclose materials that state law makes privileged. *See Virginia Code* § 51.5-39.4(4).

> (1) Information in reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for a facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

45 C.F.R. § 1386.22(c)(1) (emphasis added).

[4] Several Circuits have declared that one or both of the regulations are invalid. *See Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119, 125-26 (2nd Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Services v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1024 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427 (3rd Cir. 2000) (Alito, J.). Yet, the United States has neither withdrawn the regulation nor conceded its invalidity.

3. Because the two state agencies were unable to resolve their dispute, VOPA sued the Virginia Officials in the district court. The Virginia Officials moved to dismiss for failure to state a claim and on the basis of sovereign immunity. The district court denied the motion on both grounds. *Pet. App.* 30a-46a.

First, the trial court held that VOPA stated a claim that the Virginia officials were violating federal law and that the state officials' argument based on the peer review privilege was inappropriate for resolution on a Fed. R. Civ. P. 12(b)(6) motion because it was an "affirmative defense to the merits." *Pet. App.* 34a-35a.

Second, the district court held that sovereign immunity did not bar VOPA's suit. *Pet. App.* 35a-45a. After noting that abrogation of sovereign immunity was not at issue, *Pet. App.* 35a, the court found that Virginia had not waived its sovereign immunity. *Pet. App.* 36a-40a. Yet, the trial court found that *Ex parte Young* applied. *Pet. App.* 40a-42a. In reaching that conclusion, the district court rejected the Virginia officials' argument that the doctrine of *Ex parte Young* did not permit a suit in federal court by one state agency against officials of another agency of the same State. *Pet. App.* 43a-45a.

4. Because a denial of sovereign immunity is a final order under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

506 U.S. 139, 143-44 (1993), the Virginia Officials appealed.[6]

On appeal, the Fourth Circuit reversed. *Pet. App.* 1a-29a. The lower court found that Congress had not abrogated sovereign immunity, *Pet. App.* 8a-10a, and that Virginia had not waived its sovereign immunity. *Pet. App.* 10a-13a. Turning to whether *Ex parte Young* applied, Judge Wilkinson's opinion for a unanimous court made five points.

First, VOPA's status as a state agency is critical to whether it can invoke *Ex parte Young*. *Pet. App.* 13a-17a. While *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,* 535 U.S. 635 (2002), suggests the invocation of *Ex parte Young* requires nothing more than an allegation of an on-going violation of federal law, the inquiry is more complex when a state agency is involved. *Pet. App.* 14a. "VOPA's argument for an indiscriminate application of *Ex parte Young* cannot be reconciled with the guidance of [this] Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)." *Pet. App.* 16a (citation original).

Second, principles of dual sovereignty prevent federal courts from adjudicating this dispute. Relying on *Alden v. Maine,* 527 U.S. 706 (1999), and *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984), the Fourth Circuit found that "a federal

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[6] Because the denial of a motion to dismiss for failure to state a claim is not a final judgment, the Virginia Officials could not appeal that aspect of the judgment.

court, without the imprimatur of Congress or the consent of the state, [was not allowed] to resolve a dispute between a state agency and state officials." *Pet. App.* 19a. As the court of appeals explained:

> Recognizing an inherent power in the federal courts to settle this sort of internecine feud—"to turn the State against itself"—would disparage the status of the states as sovereigns. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability.

Pet. App. 19a-20a (citations omitted).

Third, this Court's "cases related to the political subdivisions of the states [recognize] that alleging a violation of federal law does not itself override the states' interest in maintaining their sovereignty with respect to internal state conflicts." *Pet. App.* 22a. While these cases did not involve sovereign immunity, "these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged violation of federal law, the *nature of the party* making the federal claim implicated the state's interest in

keeping its internal authority intact." *Pet. App.* 23a (emphasis original).

Fourth, VOPA could pursue its claims in state court. Litigating the issues in state court would not lead to inconsistent or erroneous applications of federal law. *Pet. App.* 25a-26a. This Court could review any decision of the Supreme Court of Virginia interpreting federal law and VOPA's convenience did not justify diminishing Virginia's sovereignty. *Pet. App.* 26a.

Fifth, VOPA's status as an independent state agency does not empower VOPA to sue state officials in federal court. The Fourth Circuit also noted that allowing state agencies to sue state officials in federal court might result in numerous lawsuits involving public universities and, conceivably, every agency that receives federal funds. *Pet. App.* 26a-28a.

In sum, "allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states." *Pet. App.* 29a. Thus, "expanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." *Pet. App.* 29a (citation omitted).

5. VOPA sought rehearing *en banc* and the court of appeals denied the request. *Pet. App.* 47a-48a. The Petition followed.

REASONS FOR DENYING THE PETITION

This Court should deny review for three reasons.

First, there is no conflict among the lower courts. There is no conflict among the circuits on the narrow issue of whether a state agency may invoke *Ex parte Young* against state officials of the same State. Additionally, the refusal of other circuits to apply *Coeur d'Alene Tribe* in other circumstances does not create a conflict with the Fourth Circuit's application of the *Coeur d'Alene Tribe* decision in these circumstances. Furthermore, there is no conflict concerning the ability of political subdivisions to invoke *Ex parte Young* against the State that created them.

Second, the Fourth Circuit's decision is fully consistent with this Court's jurisprudence. *Verizon* did not overrule *Coeur d'Alene Tribe*. Dual sovereignty principles preclude the federal courts from deciding disputes between a state agency and state officials of the same State. Moreover, a suit by a state agency against state officials of the same State was "anomalous and unheard of" at the time the Constitution was adopted.

Third, VOPA may enforce its federal law claims in the Virginia courts. The Supreme Court of Virginia's original proceedings are sufficient to decide VOPA's claims. State courts have a duty to vindicate federal rights and are capable of doing so. When a state agency may bring its federal claims in state court, a state agency may not invoke *Ex parte Young* against state officials of the same State.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS.

A. There Is No Conflict Among The Lower Courts Concerning The Ability Of A State Agency To Invoke *Ex parte Young* Against State Officials Of The Same State.

The Fourth Circuit's decision is extraordinarily narrow. The court of appeals held "only that, because VOPA is a state agency, *Ex parte Young* is the improper vehicle for VOPA to gain access to a federal forum." *Pet. App.* 28a. While the reasoning is relevant to similar issues involving political subdivisions, the lower court limited its inquiry to "'whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*,' when *the plaintiff is a state agency*." *Pet. App.* 17a (emphasis added).

On this narrow issue, there is no conflict among the lower courts. At the time the Fourth Circuit rendered its decision, no other court had addressed the issue. *Pet. App.* 14a. While a Seventh Circuit

panel subsequently addressed the issue and reached the same result, a grant of rehearing *en banc* vacated the panel discussion. *See Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548, 553 (7th Cir. 2009), *vacated and rehearing en banc granted*, (7th Cir. Nov. 10, 2009). Nevertheless, because Judge Easterbrook's opinion for the panel endorsed and expanded upon the Fourth Circuit's reasoning, *id.* at 553, it reinforces the correctness of the lower court's decision.[6]

Moreover, the lower court's ultimate result—that a state agency may not obtain injunctive relief against state officials from the same State—is consistent with other Circuits' decisions addressing suits by state agencies against state officials of the same State. The Eleventh Circuit concluded that a state agency lacks standing to obtain injunctive relief against the State in federal court. *United States v. Alabama*, 791 F.2d 1450, 1455-56 (11th Cir. 1986). The Fifth Circuit found that "[a] state agency has no constitutional rights to assert against the state of which it is a part," *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992), but also concluded that the entity suing was not a state agency. *Id.* at 1182-83.

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[6] Indeed, a vacated Circuit panel opinion of three judges is at least as persuasive as a single circuit judge's concurrence or dissent.

Furthermore, contrary to VOPA's suggestions, *Pet.* 24-25, cases from other Circuits where state protection and advocacy entities have sued state officials of the same State for injunctive relief do not undermine the Fourth Circuit's conclusion. *See Pet. App.* at 15a n.1 (distinguishing cases). Many of those cases involve suits by protection and advocacy entities organized as *private* entities, not as state agencies. *See Missouri Prot. & Advocacy Servs.*, 447 F.3d at 1023; *Center for Legal Advocacy v. Hammons*, 323 F.3d at 1264; *Houstoun*, 228 F.3d at 425 (Alito, J.). Those Circuit cases that did involve suits initiated by a protection and advocacy entity organized as a state agency did not address the sovereign immunity issue. *See Connecticut Office of Prot. & Advocacy for Persons with Disabilities*, 448 F.3d at 121 (Sotomayor, J.); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996). *Cf. Protection & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 313 (D. Conn. 2003) (permitting a different suit by Connecticut's public protection and advocacy system under *Ex parte Young* without addressing the fact that the plaintiff was a state agency).

B. The Refusal Of Other Circuits To Apply *Coeur d'Alene Tribe* In Other Circumstances Does Not Create A Conflict With The Fourth Circuit's Application Of The *Coeur d'Alene Tribe* In These Circumstances.

Undeniably, the Circuits frequently have refused to give *Coeur d'Alene Tribe* an expansive reading. *See Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008); *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2nd Cir. 2005); *Dubuc v. Michigan Bd. of Law Exam'rs*, 342 F.3d 610, 617 (6th Cir. 2003). However, contrary to VOPA's contentions, *Pet.* 19-20, this refusal to apply *Coeur d'Alene Tribe* does not constitute a conflict among the Circuits. Rather, it simply demonstrates that other Circuits view *Coeur d'Alene Tribe* as inapplicable to the unique circumstances of a particular case. Just as the validity of congressional abrogation of sovereign immunity turns on the nature of the claim, *United States v. Georgia*, 546 U.S. 151, 159 (2006), the application of *Coeur d'Alene Tribe* turns on the nature of the claim. When a state agency seeks to invoke *Ex parte Young* against officials from the same State, then *Coeur d'Alene Tribe* applies.

Significantly, none of the decisions cited by VOPA or its amici involved a situation where a state agency was seeking to invoke *Ex parte Young* against state officials from the same State. A refusal to apply *Coeur d'Alene Tribe* in other circumstances does not mean

that those Circuits would refuse to apply *Coeur d'Alene Tribe* in *these* circumstances. To the contrary, when confronted with a virtually identical situation, a Seventh Circuit panel relied on the Fourth Circuit's reasoning and reached the same result. *Indiana Prot. & Advocacy Servs.*, 573 F.3d at 553 (vacated panel opinion).

C. There Is No Conflict Concerning The Ability Of Political Subdivisions To Invoke *Ex parte Young* Against Officials Of The Same State.

Apparently recognizing that there is no conflict on the narrow issue actually decided by the Fourth Circuit, VOPA claims there is a conflict among the Circuits on the ability of political subdivisions—such as counties, cities, school boards, and special districts—to invoke *Ex parte Young* against state officials from the States that created them. *Pet.* 21-24. VOPA exaggerates both the existence of the split and the holdings of the cases that purportedly create the split.

If there was any ambiguity on this issue, it was resolved last Term by *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1100 (2009). In *Ysursa*, public employee unions challenged the ability of the State to restrict the speech of some of its political subdivisions—the local school districts. In holding that the State could restrict the speech of school districts, this Court declared:

> A private corporation is subject to the government's legal authority to regulate its conduct. A political subdivision, on the other hand, is a subordinate unit of government created by the State to carry out delegated governmental functions. A private corporation enjoys constitutional protections, but a political subdivision, "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Id. at 1101 (citations omitted). *Ysursa* simply reaffirms the constitutional rule announced in the early decades of the twentieth century. *See Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40 (1933); *Trenton v. New Jersey,* 262 U.S. 182, 185 (1923); *Stewart v. City of Kansas City,* 239 U.S. 14, 16 (1915); *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178-79 (1907). Constitutional law has changed dramatically in the last seventy-five years, but the one rule remains the same—absent an explicit state statute, political subdivisions may not invoke *Ex parte Young* against state officials of the same State.

While VOPA cites several Circuit cases allowing political subdivisions to bring federal law claims against the state officials of the same State, a careful reading of those decisions reveals that the decisions turned—at least in part—on state law considerations. *See Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 629 (10th Cir. 1998) (noting substantial independence of Colorado school districts); *Allegheny County*

Sanitary Auth. v. United States E.P.A., 732 F.2d 1167, 1173 n.3 (3rd Cir. 1984) (interpreting Pennsylvania statute as allowing political subdivision "to sue the state and federal defendants named in this suit"); *Rogers v. Brockette*, 588 F.2d 1057, 1065 (5th Cir. 1979) (Texas law allows local school boards "to attack the state agency's decisions in court."). To the extent that these decisions turn on an interpretation of the relevant state law, they are fully consistent with *Ysursa*. A State may authorize its political subdivisions to sue the State. Conversely, in as much as these decisions may be interpreted as establishing a categorical right of political subdivisions to bring federal law claims against state officials of the same State, *Ysursa* repudiates the reasoning. State law determines a political subdivision's rights against the State that created it. *Ysursa*, 129 S. Ct. at 1101.

II. THE FOURTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Fourth Circuit's decision is fully consistent with this Court's jurisprudence. This "Court has never used *Ex parte Young* to let one arm of a state sue another." *Indiana Prot. & Advocacy Servs.*, 573 F.3d at 553 (vacated panel opinion).

A. *Verizon* Did Not Overrule *Coeur d'Alene Tribe*.

Although this Court has declared that *Ex parte Young* applies whenever the complaint alleges an ongoing violation of federal laws and seeks prospective relief, *Verizon*, 535 U.S. at 645, this Court's decisions suggest the inquiry "is hardly so simple." *Pet. App.* 14a. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Coeur d'Alene Tribe*, this Court refused to apply *Ex parte Young* to situations where there was an allegation of an ongoing violation of federal law and request for injunctive relief. *Coeur d'Alene Tribe*, 521 U.S. at 269-70, 281-88; *Seminole Tribe*, 517 U.S. at 74-76. *Verizon* did not purport to overrule *Seminole Tribe* or *Coeur d'Alene Tribe*.[7] To the contrary, this Court analyzed whether the *Seminole Tribe* limitations were applicable. *Verizon*, 535 U.S. at 647-48.

Rather than the simplistic straightforward inquiry of *Verizon*, "our *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal

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[7] VOPA suggests that *Alden* casts doubt on the continued vitality of *Coeur d'Alene Tribe*. *Pet.* 20-21. Regardless of what *Alden* suggests about *Coeur d'Alene Tribe*, *Alden* clearly supports the Fourth Circuit's decision. *Pet. App.* 15a, 18a-21a. In any event, this Court will not overrule *Coeur d'Alene Tribe* by implication. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

law." *Verizon*, 535 U.S. at 649 (Kennedy, J., concurring). As this Court explained:

> To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed . . . in *Seminole Tribe* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Coeur d'Alene Tribe, 521 U.S. at 270 (opinion of the Court) (citations omitted). Instead of the "empty formalism" implied by *Verizon*, this Court "must examine the effect of the . . . suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." *Coeur d'Alene Tribe*, 521 U.S. at 281 (opinion of the Court).

B. Dual Sovereignty Principles Preclude The Federal Courts From Deciding Disputes Between A State Agency And State Officials Of The Same State.

Applying the special sovereignty interests test of *Coeur d'Alene Tribe*, federal courts may not resolve

disputes between a state agency and state officials. *Cf. Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849) (This Court would not decide which group of state officials was the legitimate government of Rhode Island). Whenever "different state actors have taken contrary positions in this litigation, federalism concerns are elevated." *Horne v. Flores*, 129 S. Ct. 2579, 2596 (2009). No branch of the National Government may "assert . . . authority over a State's most fundamental political processes." *Alden*, 527 U.S. at 751. Just as the principles of dual sovereignty are violated "when a federal court instructs state officials on how to conform their conduct to state law," *Pennhurst*, 465 U.S. at 106, they are violated when a federal court resolves "an intramural contest" between "a state's warring factions." *Reinhard*, 405 F.3d at 191 (Wilson, J., concurring). To say otherwise would mean that the National Government—through the federal judiciary—could "turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will. . . ." *Alden*, 527 U.S. at 749. "Such plenary federal control of state governmental processes" would "denigrate[ ] . . . the separate sovereignty of the States." *Id.* "It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other. This is of vital concern to States." *Coeur d'Alene Tribe*, 521 U.S. at 276 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court).

Contrary to contentions of VOPA's amici, *New Jersey Public Advocate Br.* 14-19, refusing to allow a state agency to sue State officials of the same State in federal court does not undermine the principle "that States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). In the protection of its quasi-sovereign interests, Virginia may sue private parties, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), or the United States, *Massachusetts*, 549 U.S. at 520. Moreover, because the "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002), Virginia may sue *another* State. *See, e.g., Virginia v. Maryland*, 540 U.S. 56 (2003). Yet, this is not a suit where Virginia is asserting its quasi-sovereign interests against a private party, the United States, or another state; it is a suit where one state agency is suing state officials over the meaning of federal law. It is not *Virginia v. Private Party,* or *Virginia v. United States* or *Virginia v. Maryland*, it is *Virginia v. Virginia*. *See Indiana Prot. & Advocacy Servs.*, 573 F.3d at 551 ("This suit might as well be captioned 'Indiana v. Indiana.'"). By refusing to hear this case, the Fourth Circuit did not diminish Virginia's sovereignty, it enhanced it.

This Court has never held explicitly that a state agency may not invoke *Ex parte Young* against state

officials of the same State, but it has held that a state-created governmental entity "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa*, 129 S. Ct. at 1101 (quoting *Williams*, 289 U.S. at 40).[8] Since a state-created governmental entity has no constitutional claims against the State that created it, then logically a state-created governmental entity may not invoke *Ex parte Young* against state officials of the same State. State law determines the powers of state-created governmental entities, regardless of whether such entities are "independent" state agencies or the various types of political subdivisions.

Of course, there have been instances when this Court has heard disputes between two state agencies or between two state officials. *See Horne*, 129 S. Ct. at 2590-91; *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441 (2009); *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 459 n.1 (1967). However, none of those cases involved a state agency invoking *Ex parte Young* against state officials of the same State in federal court. *Horne* involved a situation where private plaintiffs had obtained injunctive relief in federal court against state

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[8] While there are important legal and constitutional distinctions between political subdivisions and state agencies, those distinctions are not relevant to the issue of whether a state agency may invoke *Ex parte Young* against officials of the same State.

officials. Years later, one of those defendant officials wished to obtain relief from the federal court order, but the private plaintiffs and other defendant state officials opposed his efforts. *Horne*, 129 S. Ct. at 2590-91. A dispute among defendant state officials in a case initiated by a private plaintiff is fundamentally different from a case initiated by one state agency against state officials from another agency. In both *Office of Hawaiian Affairs* and *Lassen*, this Court was reviewing federal law decisions of a state supreme court. *Office of Hawaiian Affairs*, 129 S. Ct. at 1442; *Lassen*, 385 U.S. at 459. A State or state agency asking this Court to review a federal law decision of a state supreme court is fundamentally different from a state agency suing state officials in federal court. This Court has the authority to review decisions by state courts on matters of federal law without regard to sovereign immunity. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31 (1990).

C. A Suit By A State Agency Against State Officials Of The Same State Was "Anomalous and Unheard Of" At The Time The Constitution Was Adopted.

There is a presumption "that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Comm'n*, 535 U.S. at 755 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). At the time of the

Framing, English common law allowed *private* parties to obtain injunctive relief against royal officials who were violating the law. *See generally* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 10-19 (1963) (discussing English common law's treatment of suits against officers). "Without officer liability, sovereign immunity would have left governments totally unchecked—a design that would have been unbecoming of the young Republic." Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex parte Young*, 61 STAN. L. REV. 1233, 1247 (2009). Given "the common law pleading system and the relevant doctrines that complemented its role in sovereign immunity," *Ex parte Young* is "predictable." *Id.* at 1235. Thus, *Ex parte Young* is fully consistent with the experiences of those who adopted our National Charter, but "an action by a state agency against state officials in federal court, by contrast, has no similar historical pedigree, and it would be a more obvious affront to a state's sovereign interests." *Pet. App.* 18a.[9]

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[9] VOPA cites Professor Jaffe's article for the proposition that there is historical basis for the claim that local government entities could sue officers. *Pet.* 31. However, Professor Jaffe's discussion of suits by local government entities involved English cases from the *late nineteenth century*. Jaffe, *supra*, at 17-18. The English experience concerning suits by local governmental entities in the late nineteenth century is irrelevant to the

(Continued on following page)

III. VOPA MAY ENFORCE ITS FEDERAL LAW CLAIMS IN THE VIRGINIA COURTS.

VOPA's inability to invoke *Ex parte Young* does not mean that VOPA has no forum to pursue its claims. Because sovereign immunity does not apply to claims based on the self-executing provisions of the Virginia Constitution, *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 71-73 (Va. 2008), VOPA may bring an original action for a writ of mandamus in the Supreme Court of Virginia.[10] *See* Va. Const. art. VI, § 1 (conferring original jurisdiction on the Supreme Court of Virginia to hear writs of mandamus). If VOPA sued the Virginia Officials in state court and if the resolution of VOPA's claims turned on federal law, this Court could review the Supreme Court of Virginia's federal law decision. *Office of Hawaiian Affairs*, 129 S. Ct. at 1442-43.

Although the Virginia "Officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks" in federal court, *Pet. App.* 25a, VOPA nevertheless insists that it must be able to sue in federal court. *Pet.* 26-29. VOPA is wrong for three

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question of whether the Framers expected state agencies to sue officials of the same State in federal court.

[10] VOPA is not able to bring this action in a state trial court of general jurisdiction. While Virginia's trial courts of general jurisdiction may issue writs of mandamus against local officials, *Virginia Code* § 17.1-513, they lack the authority to issue writs of mandamus against state officials.

reasons. First, the Supreme Court of Virginia's original proceedings are sufficient to decide VOPA's claims. Second, state courts have a duty to vindicate federal rights and are capable of doing so. Third, when a state agency may bring its federal claims in state court, a state agency may not invoke *Ex parte Young* against state officials of the same State.

A. The Supreme Court Of Virginia's Original Proceedings Are Sufficient To Decide VOPA's Claims.

VOPA's argument misunderstands the original action for a writ of mandamus in the Supreme Court of Virginia. For example, VOPA claims that a writ of mandamus is contingent on judicial discretion. *Pet.* 26. Yet, as the Supreme Court of Virginia made clear, when "the right involved and the duty sought to be enforced are clear and certain and [when] there is no other available specific and adequate remedy, the writ will issue." *Gannon v. State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992). Thus, if federal law actually requires the Virginia Officials to produce the documents, the Supreme Court of Virginia will issue the writ. Similarly, VOPA asserts, "there appears to be no mechanism for fact finding in an original proceeding." *Pet.* 27. In reality, the Supreme Court of Virginia's rules provide for the taking of evidence in original jurisdiction proceedings. *See* Va. S. Ct. R. 5.7(b), (e). Although VOPA's claims are entirely legal and involve no facts, the Supreme Court of Virginia could resolve evidentiary disputes.

B. State Courts Are Equal To Federal Courts In Vindicating Federal Rights.

Second, to the extent that VOPA and its amici are suggesting that federal courts are superior to state courts in resolving federal law claims, the argument has no merit. "[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials. . . ." *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009). "[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). "[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990). Indeed, VOPA, while suing on behalf of others rather than itself, has asked the Virginia courts to enforce federal rights. *See Winborne v. Virginia Lottery*, 677 S.E.2d 304 (Va. 2009) (deciding whether the Virginia Lottery, a state agency, is violating the Americans with Disabilities Act).

While VOPA and its amici might view federal courts as more convenient, the purpose of dual sovereignty is not "administrative convenience," but the protection of our "fundamental liberties." *Federal Maritime Comm'n*, 535 U.S. at 769. As the abstention doctrines demonstrate, federalism concerns frequently lead to delay and inconvenience. *See* 20 Charles Allan Wright & Mary Kay Kane, FEDERAL PRACTICE &

PROCEDURE: FEDERAL PRACTICE DESKBOOK § 54 (2002) (discussing the costs of the abstention doctrines).

C. When A State Agency May Bring Its Federal Claims in State Court, A State Agency May Not Invoke *Ex parte Young* Against State Officials Of The Same State.

Because there is an adequate state forum for VOPA's claims, there is no reason to allow a Virginia state agency to invoke *Ex parte Young* against officials of the same State. *See Coeur d'Alene Tribe*, 521 U.S. at 270-80 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court) (suggesting that *Ex parte Young* is unavailable when the state courts provide an adequate forum for resolution of the claims). "Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105 (citations omitted). "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Id.* at 99 (emphasis in original). Forcing a state agency to pursue its claims against state officials in state court allows the

vindication of federal rights, but also respects the sovereignty of the State.

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

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December 18, 2009

REPLY BRIEF

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No. 09-529

Supreme Court, U.S.
FILED
DEC 29 2009
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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER,

v.

JAMES S. REINHARD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND CHARLES M. DAVIS, IN HIS OFFICIAL CAPACITY AS DIRECTOR, CENTRAL STATE HOSPITAL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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§ 10801(a)(4) 2

REPLY BRIEF FOR PETITIONER

The court below reached a result contrary to numerous circuits, using reasoning rejected by numerous circuits, in holding that petitioner Virginia Office for Protection and Advocacy cannot seek prospective injunctive relief in federal court against state officials to vindicate federal rights as authorized by *Ex parte Young*, 209 U.S. 123 (1908). That holding undermines petitioner's ability to detect (and thus deter) abuse and neglect of vulnerable populations and threatens to do the same to the other seven State Protection and Advocacy Systems that are constituted in a similar manner.

A. Contrary To Respondents' Claim, The Courts Of Appeals Are Divided On An Issue Of Exceptional Importance That Is Critical To A Comprehensive Federal Statutory Scheme To Prevent Abuse And Neglect In State-Run Institutions

1. The United States asserted below that this case presents an issue of "exceptional importance"

a. Respondents repeatedly characterize the issues in this case as "novel and narrow" (Br. in Opp. 1, 11, 22-24), but as the United States explained in an amicus brief in this very case, "[t]his case presents a question of exceptional importance to the enforcement of federal statutes designed to protect individuals

with disabilities from abuse and neglect." Pet. App. 83a. This view, expressed by the United States in an uninvited amicus brief urging that the Fourth Circuit reconsider the ruling below, plainly demonstrates that the issues present in this case warrant this Court's plenary review.

The same view is expressed by other state agencies as well. *See* Amicus Br. of N.J. Public Advocate 2.

b. Nor should this Court accept respondents' callous suggestion that the issues in this case are nothing more than novel and unimportant legal issues. Br. in Opp. 1, 11.

Far from unimportant, the federal Protection and Advocacy System statutes, which the ruling below seriously undermines, were designed to remedy the "inhumane and despicable conditions" that were frequently found in state-run institutions. *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996); *see also* 42 U.S.C. § 10801(a)(4) (congressional findings that "State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate").

Without the ability to obtain these records, a Protection and Advocacy System cannot fulfill its federal obligation to investigate and protect against abuse and neglect in state-run institutions. It is axiomatic that these agencies cannot remedy conditions of which they are unaware. But, as the

United States explained below, "[u]nder the panel's ruling * * *, a state can accept federal funds under these federal programs yet evade federal court enforcement simply by designating a state agency to serve as its [Protection and Advocacy System]." Pet. App. 85a.

Indeed, this case is indicative of the danger that will ensue if the ruling below is not reviewed and reversed by this Court. Notwithstanding respondents' failure to acknowledge the nature of the underlying dispute, this case involves concrete incidents of suspected abuse, not broad, speculative record requests. Pet. 9-11.

2. ***An intolerable, recurring division in the courts of appeals exists over whether a public entity can sue state officials from its own State for violations of federal law in federal court***

Respondents contend that no conflict exists in the courts of appeals as to whether federal courts can adjudicate suits by Protection and Advocacy Systems against state officials. But respondents reach this conclusion only by disregarding the reasoning of the court below and disregarding the results reached by other courts of appeals.

a. The court below based its rationale on the premise that no public state-created entity could sue state officials in federal court for prospective relief under *Ex parte Young*. Respondents themselves agree

that distinctions between political subdivisions and state agencies "are not relevant" to whether the federal-court review authorized by *Ex parte Young* is available. Br. in Opp. 22 n.8.

As the petition demonstrates, the ruling below creates at least a 3-to-2 division in the courts of appeals on this issue. Pet. 23. In response, respondents contend that a "careful reading" of the decisions from the Third, Fifth, and Tenth Circuits demonstrates that those courts permitted *Ex parte Young* claims to go forward because of the independence the relevant State had conferred to the plaintiff public entities. Br. in Opp. 16-17 (citing *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167 (3d Cir. 1984); *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)). That response confirms that those courts have held that a plaintiff's status as a public entity does *not* bar its suit in federal court under *Ex parte Young*. The court of appeals below reached the opposite conclusion and, in doing so, joined the Ninth Circuit. Pet. 23.

Further, to the extent respondents are correct that state law authorization to sue is relevant to the outcome of those cases (Br. in Opp. 16-17), respondents acknowledge that petitioner possesses that state law authority to sue, but contend that the Eleventh Amendment requires the suit to be heard in state court. Br. in Opp. 25. The Third, Fifth and Tenth Circuit have reached the contrary conclusion.

Respondents' reliance (Br. in Opp. 12, 15-16, 22) on *Ysursa v. Pocatello Education Association*, 129 S. Ct. 1093 (2009), and older cases holding that the *Constitution* does not create rights for public entities against their creators, is entirely misplaced. Petitioner is not seeking to enforce constitutional rights. It seeks to enforce a federal statutory right. And respondents do not dispute in this Court that, as the district court held, petitioner *has* a federal statutory right to access certain information in respondents' possession. *See* Br. in Opp. 7 n.5.

Nor do respondents dispute that Congress validly could vest a state agency such as petitioner with such a federal right. Congress did not "turn the State against itself," *Alden v. Maine*, 527 U.S. 706, 749 (1999), by unilaterally vesting in one state agency rights against the remainder of the State. As respondents concede (Br. in Opp. 2-3), the State *chose* to participate in a federal spending program that conditioned the receipt of certain federal funds on the creation of an entity with the right to access records and with the authority to pursue legal remedies. And then, without any federal encouragement, the State *chose* to constitute petitioner as a state agency, as opposed to a private nonprofit corporation. Given these two voluntary decisions by the State, respondents can hardly be heard to complain (Br. in Opp. 20-21) that petitioner has been commandeered by the federal government. *See Alden*, 527 U.S. at 755 (citing with approval *South Dakota v. Dole*, 483 U.S. 203 (1987)).

b. Respondents' apparent speculation that other courts of appeals might reach the same conclusion as the Fourth Circuit is no reason to deny review. Br. in Opp. 13. As the United States recognizes, the decision below already "creates a conflict with decisions of other circuits." Pet. App. 84a. And, as the United States explained, "federal courts have enforced [the federal Protection and Advocacy laws] in suits against state officials, without regard to whether the plaintiff [Protection and Advocacy] system was a public agency or a private non-profit." Pet. App. 91a (citing cases).

Nor is it relevant, as respondents suggest (Br. in Opp. 13), that some decisions have involved private nonprofit Protection and Advocacy Systems and others have involved public Protection and Advocacy Systems where the courts apparently assumed that such public entities could enforce federal law against state officials in federal court. *See, e.g.*, *Alabama Disabilities Advocacy Program*, 97 F.3d at 492 (Eleventh Circuit adjudicating claims of public entity Protection and Advocacy System); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.) (public entity Protection and Advocacy System); *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006) (nonprofit Protection and Advocacy System). That does not diminish the fact that, under a comprehensive federal statutory scheme, some courts of appeals permit Protection and Advocacy Systems to

adjudicate their claims in federal court while others do not (and may thus be precluding *any* enforcement of federal law, *see* pp. 11-12 *infra*). Indeed, "[u]ntil now * * * no state ever contended that it could accept federal funds yet evade federal court enforcement by designating a state agency to serve as its [Protection and Advocacy] system." Pet. App. 92a (United States brief).

Finally, the Seventh Circuit's recent decision to address en banc the issue in this case underscores the need for this Court's plenary review. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548 (2009), *op. vacated & pet. for reh'g en banc granted* (Nov. 10, 2009). Contrary to respondents' assertion (Br. in Opp. 12), that decision demonstrates that the issues presented here are real and recurring. Moreover, the conflict in the federal courts of appeals will only become more entrenched as a result of the Seventh Circuit's decision, regardless of which side of the division that court of appeals selects.[1]

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[1] Nor is there any reason for this Court to await the Seventh Circuit's decision. That case includes a threshold question (not at issue in this case) regarding the defendants' forfeiture of any claim of Eleventh Amendment immunity by their failure to raise the issue before the district court or before the three-judge panel. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (stating that Eleventh Amendment immunity "bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*").

(Continued on following page)

c. In any event, to the extent there is any question as to the adverse significance of the ruling below on the federal Protection and Advocacy System or as to the existence of a longstanding division in the federal courts of appeals over the ability of public entities to bring suits to enforce federal law in federal court against state offices, this Court should invite the Solicitor General to file a brief expressing the views of the United States.

3. *The "special sovereignty interests" analysis of the court of appeals is contrary to every other court of appeals decision rendered after* Verizon

With great understatement, respondents acknowledge that other courts of appeals "have refused" to give *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), "an expansive reading." Br. in Opp. 14. In fact, the courts of appeals have uniformly held that *Coeur d'Alene*'s "special sovereign interests" analysis is limited to suits involving title or regulatory jurisdiction over real property. Pet. 19-20; *see also* Amicus Br. of Law Professors 14-15.

Moreover, this Court recently granted certiorari in another case even though (unlike here) a pending en banc review could make the conflict at issue there disappear. *See Dillon v. United States*, 2009 WL 2899562 (U.S. Dec. 7, 2009); U.S. Br. in Opp., No. 09-6338, at 6-7.

This has been especially true since this Court's decision in *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), cited the three-Justice concurrence and the four-Justice dissent in *Coeur d'Alene*, and not the portions of the majority opinion discussing special sovereignty interests. *Id.* at 645; *see also id.* at 648-649 (Kennedy, J., concurring) ("In *Coeur d'Alene* seven Members of this Court described *Ex parte Young* as requiring nothing more than an allegation of an ongoing violation of federal law and a request for prospective relief * * *."); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (*Verizon* "limited the reach of *Coeur d'Alene*"); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 260 Fed. App'x 13, 21 (10th Cir. 2007) ("It is not clear what is left of *Coeur d'Alene* following *Verizon Maryland*."), *cert. denied*, 129 S. Ct. 104 (2008).

In any event, *Coeur d'Alene* did not authorize federal courts to engage in ad hoc balancing of federalism interests based on the identity of the plaintiff. *Coeur d'Alene* focused exclusively on the "type of relief" sought to determine whether the suit was "barred by the Eleventh Amendment" or "permitted under *Ex parte Young*." 521 U.S. at 281 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)); *see also id.* at 282 (describing "far-reaching and invasive relief the Tribe seeks, relief with

consequences going well beyond the typical stakes in a real property quiet title action").[2]

B. The Availability Of Federal Court Redress For Federal Law Violations Under *Ex Parte Young* Is Not Dependent Upon State Court Remedies, Which Are Virtually Unavailable In This Case In Any Event

Relying on the two-Justice plurality opinion in *Coeur d'Alene*, respondents assert that there is no reason to allow petitioner to sue respondents in federal court on its federal claims because an original proceeding for mandamus in the Supreme Court of Virginia provides "an adequate forum" to address those federal claims. Of course, a majority of this Court in *Coeur d'Alene*, and then again in *Verizon*, rejected the very proposition that an adequate state forum was relevant when the suit was brought by either an Indian Tribe or a private business incorporated by the State. There is no reason a state-created public entity should be subject to different rules.

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[2] Respondents also suggest (Br. in Opp. 18) that *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), supports the decision below. But *Seminole Tribe* simply held that when Congress creates a federal right tied to an exclusive private right of action that required an injured party to sue the State, and not a state official, the injured party may not sue the state official under *Ex parte Young*. *See Verizon*, 535 U.S. at 647. There is no evidence that Congress intended to preclude reliance on *Ex parte Young* to enforce the federal rights created under the Protection and Advocacy statutes.

But, in any event, the Virginia Supreme Court (which respondents assert is the only state court open to petitioner, Br. in Opp. 25 n.10) is not an adequate forum. First, that court is not obliged to provide relief even if it finds a violation of law. The very case cited by respondents (Br. in Opp. 26) makes this clear: "A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion. Due to the drastic character of the writ, the law has placed safeguards around it. Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice." *Gannon v. State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992). Further, if the Virginia Supreme Court denied relief based on these discretionary factors, rather than its interpretation of federal law, it is unclear whether this Court would have jurisdiction to review that ruling. *Cf. Yesler v. Board of Harbor Line Comm'rs*, 146 U.S. 646, 657 (1892) (when "the decision of the [state] Supreme Court indicates that, in its opinion, relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself" then "[t]his was a [state law] ground broad enough to sustain the judgment, irrespective of the decision of any Federal question").

Nor do respondents dispute petitioner's contention (Pet. 27) that the Virginia Supreme Court

lacks the authority to issue interim mandamus relief (akin to a preliminary injunction) to preserve the status quo. In this case, for example, the district court ordered that respondents preserve the documents pending completion of the proceedings. A forum that lacks the authority to prevent such irreparable harm could hardly be considered adequate.

Finally, respondents suggest (Br. in Opp. 26) that the Virginia Supreme Court has a fact-finding mechanism, contrary to that court's own precedent. Pet. 27. But the rules respondents cite involve only the possibility of taking depositions. Respondents do not explain (or point to any case explaining) how the Virginia Supreme Court can resolve any factual disputes that turn on credibility (such as whether particular documents exist) based on deposition testimony alone.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted. In the alternative, this Court should invite the views of the Solicitor General of the United States as to whether review should be granted.

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DECEMBER 29, 2009

AMICUS CURIAE BRIEF

No. 09-529

In the Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES S. REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner, an independent state agency, brought this action against state officials for prospective injunctive relief to remedy ongoing violations of the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq.* The question presented is whether the Eleventh Amendment bars this suit, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because petitioner is a state agency.

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In the Supreme Court of the United States

No. 09-529

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES S. REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. In 1975, Congress established the first of several grant programs that provide States funding to create protection and advocacy (P&A) systems to protect individuals with disabilities or mental illness from abuse and neglect. The law was enacted in response to reports of severe abuse and neglect at a New York state institu-

tion for the mentally disabled. See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6012 (1976); S. Rep. No. 1297, 93d Cong., 2d Sess. 59 (1974). In 2000, Congress reauthorized the statute as the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), Pub. L. No. 106-402, 114 Stat. 1677 (42 U.S.C. 15001 *et seq.*), finding that "individuals with developmental disabilities are at greater risk than the general population of abuse [or] neglect," 42 U.S.C. 15001(a)(5), and are in need of improved services and assistance, 42 U.S.C. 15001(a)(6) and (12).

Under the DD Act, a State may receive federal funding to improve "community services and opportunities," including medical care, job training, and social supports, available to persons with developmental disabilities. 42 U.S.C. 15023(a), 15024. If the State wishes to receive this funding, it must create and maintain a P&A system to "protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. 15043(a). The P&A system is entitled to additional federal funding, which is paid directly to the system. 42 U.S.C. 15042(a) and (b).

Similar concerns about abuse and neglect of mentally ill individuals in state-run psychiatric facilities led to the enactment of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. 10801 *et seq.*, in 1986. See S. Rep. No. 109, 99th Cong., 1st Sess. 1-3 (1985) (*PAIMI Senate Report*). The PAIMI Act authorized additional funding for P&A systems established pursuant to the DD Act, and expanded their mission to encompass the protection of individuals with mental illness. 42 U.S.C. 10802(2), 10803, 10827. The PAIMI Act was reauthorized most recently in 2000, see Youth Drug and Mental Health Services Act, Pub. L.

No. 106-310, Div. B, § 3206(f), 114 Stat. 1195. Congress has also enacted several other statutes that provide additional funding for P&A systems.[1]

b. Under the DD Act and the PAIMI Act, a P&A system "shall have the authority to investigate incidents of abuse and neglect * * * if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). To ensure that such investigations are effective, the statutes provide that P&A systems "shall * * * have" a broad right of access to "all records" that are relevant to an investigation in enumerated circumstances.[2] 42 U.S.C. 10805(a)(4), 15043(a)(2)(I) and (J). And P&A systems are entitled to prompt access: under the DD Act, institutions ordinarily must produce requested records within three business days of a P&A system's request, and must provide "immediate access" to records in cases involving the death of, or immediate danger to, a disabled individual. 42 U.S.C. 10543(a)(2)(J). "[R]ecords" are defined to include any records created by an institution's staff or an investigating agency, including those that "describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents." 42 U.S.C. 10806(b)(3)(A); see 42 U.S.C. 15043(c). The PAIMI Act specifies that these federal rights of access exist even if state law would otherwise "prohibit [the system] from obtaining access to the records of in-

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[1] See 29 U.S.C. 794e, 3004; 42 U.S.C. 300d-53, 1320b-21, 15461.

[2] P&A systems are also entitled to obtain access to disabled individuals receiving services, 42 U.S.C. 15043(a)(2)(H), and access to facilities that provide care to mentally ill individuals, 42 U.S.C. 10805(a)(3).

dividuals with mental illness in accordance with" federal law.[3] 42 U.S.C. 10806(b)(2)(C).

The DD and PAIMI Acts provide that a P&A system "shall have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(B), 15043(a)(2)(A)(i). In addition to pursuing remedies on their own behalf, P&A systems also may "pursue administrative, legal, and other remedies on behalf of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(C); see 42 U.S.C. 15044(b).

A participating State has the option to designate either a state agency or a private nonprofit entity to serve as its P&A system. See 42 U.S.C. 10805(c)(1)(B),

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[3] The Department of Health and Human Services (HHS), which administers the DD and PAIMI programs, see 42 U.S.C. 15002(26), 15004, 10802(6), 10803, 10826, has promulgated regulations defining records as including certain evaluative materials, but stating that "nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees." 42 C.F.R. 51.41(c)(4); 45 C.F.R. 1386.22(c)(1). A number of courts of appeals have ruled that notwithstanding HHS's regulation, the PAIMI Act preempts state peer-review privileges. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, No. 08-3183, slip op. 36-37 (7th Cir. Apr. 22, 2010) (en banc); *Protection & Advocacy for Persons with Disabilities, Conn.* v. *Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006); *Missouri Prot. & Advocacy Servs.* v. *Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023-1024 (8th Cir. 2006); *Center for Legal Advocacy* v. *Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000). The question whether a P&A system is entitled to obtain access to peer-review records when such records are privileged under state law is currently under regulatory review, see, *e.g.*, 73 Fed. Reg. 19,708, 19,731-19,732 (2008), and is not presented in this petition.

15044(a). Under either alternative, the P&A system must be independent of any state agency that provides treatment or services, 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), to ensure that the system will be effective in investigating abuse and neglect at state-run (as well as private) facilities. See *PAIMI Senate Report* 2. Whether the P&A system is public or private, the DD Act provides that the Governor may not appoint more than one-third of the system's governing board, 42 U.S.C. 15044(a)(2), and the Act also restricts the State's ability to apply funding and hiring restrictions on the system, 42 U.S.C. 10543(a)(2)(K). In addition, once a State establishes its P&A system, it may change the public or private nature of the system only by redesignating the system for "good cause." 42 U.S.C. 15043(a)(4).

c. The Commonwealth of Virginia has elected to participate in these federal spending programs. Virginia chose to place its P&A system in an independent state agency—the petitioner in this case—known as the Virginia Office of Protection and Advocacy. See Va. Code Ann. § 51.5-39.2(A) (2009). Petitioner is independent of the Attorney General of Virginia and has authority "to investigate complaints relating to abuse and neglect or other violation of the rights of persons with disabilities in proceedings under state or federal law, and to initiate any proceedings to secure the rights of such persons." *Ibid.*

2. Petitioner filed this action in the United States District Court for the Eastern District of Virginia, seeking records in connection with its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of institutions operated by the Commonwealth. Pet. 9-11. The

defendants—respondents in this Court—are three state officials. Compl. paras. 10-12.

Petitioner alleged that in 2006, two patients at state-run institutions for individuals with mental illness or developmental disabilities had died and a third had been injured, leading petitioner to open investigations into whether those events were the result of abuse or neglect. Compl. paras. 13-26. Petitioner requested that respondents provide records relating to any risk-management or mortality reviews conducted with respect to the deaths and injuries. *Id.* paras. 15, 21, 27. Respondents, petitioner alleged, refused to produce the records on the basis of an asserted peer-review privilege. *Id.* para. 28. Petitioner alleged that the DD and PAIMI Acts entitled it to receive the records, notwithstanding any state-law privilege that might otherwise apply. *Id.* paras. 39, 41, 48. Petitioner sought a declaration that respondents' "refusal to provide the records requested * * * is in violation of the DD and PAIMI Acts"; an injunction requiring respondents to provide access to "records mandated by the DD and PAIMI Acts"; and an injunction prohibiting respondents "from interfering, in any way, with [petitioner's] access to records." *Id.* paras. A-C.

Respondents moved to dismiss, contending, as relevant here, that they were immune from suit under the Eleventh Amendment. Pet. App. 31a, 35a. The district court denied respondents' motion, explaining that because petitioner sought declaratory and injunctive relief against state officials in their official capacities, under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment did not bar the suit. In determining whether *Ex parte Young* applies, the district court stated, "a court 'need only conduct a straightforward inquiry into

whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Pet. App. 41a (quoting *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (*Verizon*)). The court also rejected respondents' contention that because petitioner is a state agency, "special sovereignty interests" counseled against allowing the suit to proceed under *Ex parte Young*. The court reasoned that "[i]t is the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests," and petitioner's suit properly sought prospective relief to enforce federal law. *Id.* at 44a-45a.

3. Respondents appealed the district court's sovereign immunity ruling under the collateral order doctrine, Pet. App. 6a; see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the court of appeals reversed and remanded. The court acknowledged that under the "straightforward inquiry" set out in *Verizon*, 535 U.S. at 645, and followed by the district court, *Ex parte Young* would permit petitioner's suit. Pet. App. 13a-14a. Indeed, the court noted, respondents conceded that petitioner's suit could proceed under *Ex parte Young* if it were brought by a private P&A system or an individual. *Id.* at 16a-17a.

Nonetheless, the court reasoned, relying on *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" may be barred by sovereign immunity if the suit implicates "special sovereignty interests." Pet. App. 16a. In the court's view, petitioner's status as a state agency rendered the suit an "intramural contest" that "encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action

brought by a private plaintiff." *Id.* at 17a. The court found support for that proposition in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), which held that an action under *Ex parte Young* is not available to enforce state law, and in *Alden* v. *Maine*, 527 U.S. 706 (1999), which held that Congress lacks the power under the Commerce Clause to abrogate state sovereign immunity in state courts, as well as in decisions holding that state political subdivisions do not have constitutional rights that may be enforced against the State, Pet. App. 22a (citing *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907)). The court therefore held that "the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court." *Id.* at 17a. A state P&A system, the court observed, could still seek to enforce the DD and PAIMI Acts against state officials in state court, to the extent permitted by state law. *Id.* at 25a.

4. Petitioner filed a petition for rehearing and rehearing *en banc*. The United States filed a brief as *amicus curiae* in support of petitioner. Pet. App. 82a-97a. The court of appeals denied rehearing. *Id.* at 47a-48a.

DISCUSSION

The court of appeals incorrectly held that petitioner, as a state agency, may not invoke *Ex parte Young*, 209 U.S. 123 (1908), to enforce state officials' federal-law obligations under the DD and PAIMI Acts. The court of appeals' decision departs from this Court's precedents, which hold that *Ex parte Young* permits a suit whenever the complaint seeks prospective relief for an ongoing violation of federal law, regardless of the identity of the plaintiff. It also conflicts with the Seventh Circuit's re-

cent decision in *Indiana Protection & Advocacy Services* v. *Indiana Family & Social Services Administration*, No. 08-3183 (Apr. 22, 2010) (en banc) (*IPAS*), and threatens to undermine the enforcement of federal laws that Congress designed to protect especially vulnerable individuals from the abusive and neglectful practices that can result in injury and death. This Court's review is warranted.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER MAY NOT BRING AN *EX PARTE YOUNG* SUIT AGAINST STATE OFFICIALS

A. 1. Over a century ago, in *Ex parte Young*, this Court held that a federal court may adjudicate a suit against a state officer to enjoin official actions that violate federal law, even if the State would be immune under the Eleventh Amendment if the same suit were brought against the State itself. 209 U.S. at 159-160; see, *e.g.*, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in the judgment). This longstanding doctrine rests on the recognition that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

The premise on which *Ex parte Young* is based is that a state officer who violates federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. In such circumstances, "[t]he state has no power to impart to [its officer] any immunity from responsibility to the supreme authority of the

United States." *Ibid.* Accordingly, the officer may not invoke the sovereign immunity of the State, and the federal courts may adjudicate and enforce the officer's federal-law obligations. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984) (*Pennhurst*).

The availability of the *Ex parte Young* doctrine in suits against state officials turns on the nature of the relief that the plaintiff seeks. See *Green*, 474 U.S. at 68-69. A plaintiff may not invoke *Ex parte Young* to sue state officials for money damages to be paid out of the state treasury, see *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), or for any relief that in substance would "impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," *Verizon*, 535 U.S. at 646 (internal quotation marks, citation and emphasis omitted); see *Jordan*, 415 U.S. at 667. This limitation on the *Ex parte Young* doctrine stems from the recognition that while prospective remedies are "necessary" to protect federal rights, *Green*, 474 U.S. at 68, permitting "retroactive relief * * * would effectively eliminate the constitutional immunity of the States," *Pennhurst*, 465 U.S. at 105; *Jordan*, 415 U.S. at 653, 663. In an action for retrospective remedies, therefore, the State "is allowed to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 663 (citation omitted).

Applying these principles, this Court held in *Verizon* that in determining whether a plaintiff may invoke *Ex parte Young* to avoid an Eleventh Amendment bar to suit, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly charac-

terized as prospective.'" *Verizon*, 535 U.S. at 645 (brackets in original) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).

2. Petitioner's complaint satisfies the "straightforward inquiry" set out in *Verizon*. Petitioner named as defendants three state officials in their official capacities. Compl. paras. 10-12; see *Verizon*, 535 U.S. at 645. Petitioner alleges that respondents are committing an ongoing violation of federal law by refusing to provide petitioner with access to patient records, as required by the DD and PAIMI Acts. Compl. paras. 41-42, 49-50. And petitioner seeks purely prospective relief: a declaration that respondents' refusal to provide the requested records violates federal law, and an injunction directing respondents to allow access to the records. *Id.* paras. A-B; Pet. 11. *Ex parte Young* requires no more. See *Verizon*, 535 U.S. at 646.

Indeed, respondents and the court of appeals acknowledged that examining the four corners of the complaint for the determinative characteristics identified in *Verizon* would lead to the conclusion that petitioner may avail itself of *Ex parte Young*. Thus, respondents "concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." Pet. App. 16a-17a.

B. Because petitioner is a state agency, however, the court of appeals reasoned that "this case differs from *Ex parte Young* in a critical respect," Pet. App. 14a, rendering *Verizon*'s "straightforward inquiry" inapplicable. That conclusion was erroneous.

1. The court of appeals relied primarily on *Coeur d'Alene Tribe*, which it read as requiring a case-by-case analysis of whether a suit that "otherwise satisfie[s] the

requirements of *Ex parte Young*" implicates "special sovereignty interests" that outweigh the importance of ensuring prospective compliance with federal law. Pet. App. 16a (quoting *Coeur d'Alene Tribe*, 521 U.S. at 281). But this Court has not engrafted a "special sovereignty interests" inquiry onto the traditional *Ex parte Young* analysis.

In *Coeur d'Alene Tribe*, the Court held that although the plaintiff sought prospective relief for an alleged ongoing violation of federal law, *Ex parte Young* did not permit the suit because it sought "the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." 521 U.S. at 282. Thus, rather than seeking "to bring the State's regulatory scheme into compliance with federal law," *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment), the suit differed from "a typical *Young* action" in that the Tribe sought to divest the State of any authority to regulate the disputed lands, *ibid.*; *id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment). Although other portions of the opinion, authored by Justice Kennedy and joined by Chief Justice Rehnquist, found the presence of "special sovereignty interests" significant and urged a case-by-case approach to the application of *Ex parte Young*, see *id.* at 270-280, the seven other Justices reaffirmed that the inquiry governing whether an *Ex parte Young* suit may proceed against state officials is "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 298-299 (Souter, J., dissenting); see *Verizon*, 535 U.S. at 648-649 (Kennedy, J., concurring).

In *Verizon*, the Court confirmed that *Ex parte Young* does not call for a case-by-case approach based on "special sovereignty interests." There, the Fourth Circuit, relying on the case-by-case balancing test proposed by Justice Kennedy in *Coeur d'Alene Tribe*, 521 U.S. at 270-280, had held that the plaintiffs could not bring an *Ex parte Young* suit against members of the Maryland Public Service Commission. See *Bell Atl. Maryland Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 294-298 (4th Cir. 2001), vacated *sub nom. Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This Court rejected that analysis and adopted the "straightforward inquiry" set out in Justice O'Connor's *Coeur d'Alene Tribe* concurrence. See *Verizon*, 535 U.S. at 645. The Fourth Circuit therefore erred in this case in departing from the *Verizon* framework and holding that "special sovereignty interests" could justify barring petitioner's suit even though it otherwise satisfies the requirements of *Ex parte Young*.

2. Even if the court of appeals were correct that an ad hoc consideration of "special sovereignty interests" has a place in the *Ex parte Young* analysis after *Verizon*, the court was wrong to conclude that such interests justify barring petitioner's suit here. Respondents and the court of appeals acknowledged, Pet. App. 16a-17a, that nothing about the relief sought in this case—an injunction requiring disclosure of the records to which petitioner is allegedly entitled under federal law—would unduly infringe state sovereignty interests, and indeed they conceded that a private P&A system or an individual could bring this suit under *Ex parte Young*. The "special sovereignty interests" on which the court relied, therefore, pertained narrowly to the State's asserted interest in not having its officers brought into federal

court by another, independent component of the State, regardless of the relief sought or the federal-law nature of the suit. To permit a state agency to "force other state officials to appear before a federal tribunal," the court reasoned, would be to adjudicate an "intramural" dispute, resulting in a "substantial" "infringement on a state's sovereign dignity." *Id.* at 17a-18a (quoting *Virginia Office for Prot. & Advocacy* v. *Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring)).

Even if federal courts might in some circumstances appropriately refrain on sovereign immunity grounds from adjudicating a state-agency suit that otherwise satisfies *Ex parte Young*, no such circumstances are presented here. Most fundamentally, the suit is not, as the court of appeals would have it, an "intramural contest." Pet. App. 17a (citation omitted). The State established petitioner specifically to enforce the federal duties that the State agreed to assume under the DD and PAIMI Acts, see Pet. 6-7 & n.2, and petitioner receives funds to do so directly from the federal government, 42 U.S.C. 10823, 15042(b). When petitioner sues state officials to enforce the DD and PAIMI Acts, then, petitioner is implementing federal law and policy, not engaging in an intramural state political dispute. See *IPAS*, slip op. 16; *id.* at 47 (Posner, J., concurring).

Moreover, the court of appeals overlooked a key feature of the DD and PAIMI Acts. Those Acts require that state-agency P&A systems, like non-profit P&A systems, be independent of state governmental control —precisely because, in protecting the rights of the disabled, they must sometimes take an adversarial position vis-a-vis other state entities. See 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), 15044(a). Petitioner is thus "insulated from the type of state control over policy * * * and

governance that could justify treating this as an 'intramural' dispute." *IPAS*, slip op. 16.

In choosing to accept federal funds under the DD and PAIMI Acts, the State agreed that it would create a P&A system that would be empowered to enforce federal requirements against state-run facilities. In implementing that agreement, the State chose to create a state entity rather than assign those functions to a private non-profit orgnaization. Having made those choices, the State cannot now argue that the petitioner's efforts to enforce the requirements of the DD and PAIMI Acts are an "affront," Pet. App. 18a, while the same suit would be permissible if brought by a non-profit P&A. See *IPAS*, slip op. 16; accord *id.* at 47 (Posner, J., concurring). Especially because the nature of petitioner's otherwise permissible *Ex parte Young* suit to enforce federal law is solely the result of the State's own choices regarding the assignment of P&A functions, it is difficult to see how the State's sovereignty is infringed.

3. *Pennhurst*, *supra*, and *Alden* v. *Maine*, 527 U.S. 706 (1999), on which the court of appeals also relied, Pet. App. 18a-19a, do not suggest otherwise. In *Pennhurst*, the Court held that *Ex parte Young* does not apply in suits alleging violations of state law, because the relief sought in such a suit would require a federal court to "instruct[] state officials on how to conform their conduct to state law," thereby "intru[ding] on state sovereignty" without vindicating any federal interest. *Pennhurst*, 465 U.S. at 106. That conclusion does not suggest that state entities like petitioner, established at the election of the State under a federal spending program, may not themselves invoke *Ex parte Young* to enforce federal law. Petitioner's status as a state agency does not

alter the fact that petitioner seeks only to require state officials to comply with specific federal-law duties.

In *Alden*, the Court held that Congress lacked the power under the Commerce Clause to abrogate a non-consenting State's immunity from damages actions in state court, in part because "plenary federal control of state governmental processes denigrates the separate sovereignty of the States." 527 U.S. at 749 (state-court abrogation could "commandeer the entire political machinery of the State."). *Alden*'s holding has no application here, as respondents do not contend, nor could they, that the State's voluntary participation in the DD Act and PAIMI Act funding programs raises similar commandeering issues. Nor does this suit somehow implicate any more general concern about federal control over intrastate governance: the relief sought—access to records—will not result in federal regulation of the structure of state government or purely internal political disputes. See *IPAS*, slip op. 46-47 (Posner, J., concurring).

4. The court of appeals also erred in relying on the line of cases beginning with *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), in which the Court held that state political subdivisions may not enforce certain constitutional provisions against a State. See Pet. App. 22a-23a (citing cases); see also *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009). As the court of appeals acknowledged, "[s]overeign immunity was not at issue" in that line of cases. Pet. App. 23a. In addition, the conclusion that the United States Constitution generally does not regulate a State's relationship with its political subdivisions, see *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344 (1960), does not imply a blanket rule that federal courts must refrain from adjudicating any suit

between different arms or creations of state government. Indeed, this Court has adjudicated such suits when the state entities are sufficiently independent of each other to create the requisite adversity. See, *e.g.*, *Lassen* v. *Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 459 n.1 (1967). That adversity is present here. See pp. 14-15, *supra*; Pet. 32-34.

II. THE DECISION BELOW CONFLICTS WITH A RECENT EN BANC DECISION OF THE SEVENTH CIRCUIT

A. The decision below conflicts with the Seventh Circuit's recent en banc decision in *IPAS*, *supra*. There, Indiana Protection and Advocacy Services (IPAS), a state-agency P&A system, brought suit seeking injunctive relief requiring state officials to permit it access to certain patient records. *IPAS*, slip op. 8-9. A panel of the Seventh Circuit raised the *Ex parte Young* question *sua sponte*, and, following the decision below, held that IPAS could not invoke *Ex parte Young* because of IPAS's status as a state agency. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, 573 F.3d 548, 552 (2009), vacated, No. 08-3183 (7th Cir. Nov. 10, 2009).

The en banc Seventh Circuit noted its disagreement with the Fourth Circuit's decision in this case, *IPAS*, slip op. 18 n.8, and held that "IPAS's lawsuit is a classic application of *Ex parte Young*." *Id.* at 18. The availability of *Ex parte Young*, the court reasoned, is governed by this Court's decision in *Verizon*—not *Coeur d'Alene Tribe*—and turns on "the identity of the defendant and the nature of the relief sought, not on the nature or identity of the plaintiff." *Id.* at 14. The court rejected the argument that IPAS's suit was a mere "intramural" dispute that should not be adjudicated by the federal

courts, stating that federal law required IPAS to be independent "from state government control." *Id.* at 16. To give the State's decision to create a state P&A system "any weight in the Eleventh Amendment inquiry," the court reasoned, would lead to a "strange" result, permitting the State to accept federal funds but then to use its choice to establish a state agency to "shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens." *Id.* at 16-17. Notably, the en banc court's *Ex parte Young* ruling in *IPAS* was unanimous, as Judge Easterbrook, the author of the panel opinion, "join[ed] [his] colleagues in disagreeing with" the Fourth Circuit's decision in this case. *Id.* at 58 (Easterbrook, J., dissenting).[4]

B. In addition, as petitioner notes, Pet. 24-25, the Second and Eleventh Circuits have adjudicated the merits of suits similar to petitioner's, in which a state-agency P&A system sought injunctive relief requiring state officials to comply with the access provisions of the DD and PAIMI Acts. See *State Office of Prot. & Advocacy for Persons with Disabilities* v. *Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996) (*Tarwater*). Because neither decision addressed the *Ex parte Young* issue,

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[4] In addition to holding that IPAS's suit was permissible under *Ex parte Young*, the Seventh Circuit held that the PAIMI Act provided a right of action to obtain access to records, *IPAS*, slip op. 19-36, and that IPAS was entitled to review the records that it sought, *id.* at 36-37. Judge Easterbrook dissented from the court's right-of-action holding. *Id.* at 49-63. This case presents no question concerning the availability of a right of action, and there is in any event no circuit conflict on that issue.

they do not squarely conflict with the decision below. Nonetheless, those decisions indicate that in at least two of the other circuits with state-agency P&A systems, the parties and the courts have assumed that the P&A systems can sue for injunctive relief to enforce their rights under the DD and PAIMI Acts.

III. THE QUESTION PRESENTED IS IMPORTANT

The court of appeals' decision threatens to vitiate petitioner's ability to enforce its federal right to obtain access to records at state-run institutions, as well as access to such facilities and their patients. The DD and PAIMI Acts make these access rights a centerpiece of the P&A systems' authority, see 42 U.S.C. 10805(a)(3) and (4): 15043(a)(2)(H)-(J); S. Rep. No. 493, 98th Cong., 2d Sess. 30 (1984), and P&A systems invoke these rights in a broad range of situations in order to conduct investigations into potential abuse and neglect. See, *e.g.*, *Disability Law Ctr. of Alaska, Inc.* v. *Anchorage Sch. Dist.*, 581 F.3d 936 (9th Cir. 2009) (upholding non-profit P&A system's right to obtain contact information of guardians of disabled students in a public school); *Hartford Bd. of Educ.*, 464 F.3d at 239-242 (upholding public P&A system's access to a state-run school for disabled children, to interview the children, and to obtain personal records); *Tarwater*, 97 F.3d at 498-499 (upholding public P&A system's access to medical records of patients in a state facility).

Under the court of appeals' decision, however, petitioner will effectively be unable to enforce its rights against state-run institutions in any forum: according to respondents and the court of appeals, petitioner's only potentially available avenue to obtain the records it seeks in state court would be an action for mandamus in

the Virginia Supreme Court. Pet. App. 25a-26a; Br. in Opp. 26. But that extraordinary remedy, available only at the court's discretion and upon a showing of clear entitlement, see *Umstattd* v. *Centex Homes, G.P.*, 650 S.E.2d 527, 530 (Va. 2007), would not enable petitioner to obtain the broad and expeditious access to records, facilities and individuals that the DD and PAIMI Acts envision. See *IPAS*, slip op. 17-18 n.7 (state-court mandamus remedy is inadequate because "Congress clearly intended [P&A systems] * * * to be able to respond quickly to threats of imminent harm"); Pet. 26-27.

Without the ability to judicially enforce its rights of access, a P&A system would be unable to fulfill its investigatory functions with respect to state facilities. Cf. 45 Fed. Reg. 31,009 (1980). Congress chose to accord broad investigative authority to P&A systems because prompt investigation of individual suspected instances of abuse is the most effective way to learn of abusive and neglectful conditions before they become systemic, and to protect individuals who are currently being abused or are in imminent danger. See *PAIMI Senate Report* 2-3. The federal government, even if it might bring enforcement actions on its own, see *IPAS*, slip op. 40 (Posner, J., concurring), cannot conduct these individual, quick-response investigations in every jurisdiction. And although HHS may suspend or terminate funding to noncompliant States, 42 C.F.R. 51.10, 45 C.F.R. 1386.111, that action would not serve to respond to or remedy individual instances of abuse and neglect, and terminating funding would simply penalize the P&A system and the disabled individuals who are "the intended beneficiaries of the federal program." *IPAS*, slip op. 39 (Posner, J., concurring). Protecting disabled individuals in the manner contemplated by Congress therefore fundamentally

depends on the investigatory powers vested in the local P&A systems, which in turn are founded on access to records, facilities and individuals. See *id.* at 38.

The court of appeals' decision also threatens to create a two-tiered and unequal system, in which private P&A systems would be able to bring suit in federal court against state or private institutions, while public P&A systems would be limited to enforcing legal remedies against private facilities. As a result, patients or clients of public facilities in States with public P&A systems would not receive the full extent of the protections provided in the DD and PAIMI Acts. But the DD and PAIMI Acts do not differentiate between the capabilities of private and public P&A systems; they assume that both will be able to enforce the Acts' uniform standards of care with respect to disabled and mentally ill individuals. See 42 U.S.C. 10802(2), 10805, 15043(a). Congress could not have contemplated that the extent of protection enjoyed by disabled individuals in each State would turn on whether the State chose to create a private or public P&A system.

Review is therefore warranted to resolve the conflict between the decision below and the Seventh Circuit's decision in *IPAS*, and to prevent the Fourth Circuit's decision from undermining the efforts of state-agency P&As to enforce their federal right of access to records and to investigate suspected abuse. Although the Fourth Circuit is the only court to date to restrict a state-agency P&A system's invocation of *Ex parte Young*, the issue is likely to arise in other jurisdictions, as the *IPAS* case demonstrates. In addition, the uncertainty created by the court of appeals' decision and the circuit conflict is itself harmful to public P&A systems' functions. With the availability of a suit under *Ex parte*

Young in doubt, P&A systems may be hindered in their ability to negotiate expeditious access to records, facilities, and individuals without litigation, and when they do go to court, they may face protracted litigation. Having to litigate this threshold procedural issue would in itself thwart the prompt access rights that are essential to the P&A systems' investigatory functions. Review by the Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

—v.—

JAMES S. REINHARD, Commissioner, Department of Behavioral Health and Developmental Services, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction and experts in the law governing the federal courts. Although *amici* share differing views on the appropriate scope of the Eleventh Amendment, *amici* agree that the rule affording jurisdiction to federal courts to grant prospective injunctive relief against state officers compelling obedience to federal law regardless of the plaintiff's identity, as established by *Ex parte Young*, 209 U.S. 123 (1908), plays a vital role in our federal system, and is "indispensable to the establishment of constitutional government and the rule of law." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 14 (6th ed. 2002). *Amici* support certiorari in this case because the decision of the Court of Appeals is deeply inconsistent with both the principles animating the doctrine of *Ex parte Young* and this Court's subsequent applications thereof, and risks undermining the supremacy of federal law if allowed to stand.

SUMMARY OF ARGUMENT

The doctrine of *Ex parte Young* is based on the well-accepted proposition that the Constitution's Supremacy Clause deprives state officers of any law-

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

ful authority to violate federal law. A state officer who so acts is no longer an "alter ego" of the state, and is thereby not entitled to invoke the Eleventh Amendment as a defense in federal court to any suit for prospective relief. As this Court has explained, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

This Court has never suggested that the applicability of *Ex parte Young* turns in any way on the identity of the plaintiff. Rather, in instances where this Court has identified constraints on the scope of *Ex parte Young* actions, those limits have invariably sounded in the nature of the relief sought—requiring that a suit be for prospective, rather than retrospective, relief; requiring that the claim arise under federal, rather than state, law; requiring that Congress not have displaced *Ex parte Young* through an alternative remedial scheme; and disallowing *Ex parte Young* actions that are functionally equivalent to actions to quiet title.

These strands of doctrine reinforce rather than undermine *Ex parte Young*'s core, which demands only a " 'straightforward' inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in

the judgment) (alteration in original)). Clearly, those criteria are satisfied here.

Notwithstanding the clear, well-established, and time-tested principles at the heart of the *Ex parte Young* doctrine, the Court of Appeals in this case announced a heretofore undiscovered destabilizing exception that threatens substantial harm to settled jurisprudence, holding that *Ex parte Young* depends on the identity of the *plaintiff*, and does not afford any remedies for ongoing violations of federal law in suits by state-created agencies specifically authorized by Congress to enforce federal law. *See Va. Office for Prot. & Advocacy v. Reinhard*, 568 F.3d 110 (4th Cir. 2009). While it may be true as a descriptive matter that few cases invoking *Ex parte Young* have been brought by agencies such as the Virginia Office for Protection and Advocacy, it is certain that *no* decision, prior to the lower court decision here, has ever suggested that *Ex parte Young*'s applicability depends on the identity of the plaintiff, whether the plaintiff be a citizen, an alien, a legal entity, or a state agency created in response to an exercise of congressional power under the Spending Clause. Allowing the availability of *Ex parte Young* relief to turn on factors other than those previously recognized by this Court—including the identity of parties that have been empowered by states to enforce federal mandates—risks undermining the doctrine's vital role in our constitutional system.

Especially in the context of Spending Clause legislation such as the federal statute here at issue, to give states that have been granted substantial federal funds in exchange for certain promises that kind of indirect but unavoidable control over their amenability to prospective relief turns the Eleventh

Amendment into a means of avoiding compliance with federal law—the very evil that the *Ex parte Young* doctrine exists to prevent.

ARGUMENT

I. THE CENTRAL PREMISE OF *EX PARTE YOUNG* IS THAT THE CONSTITUTION'S SUPREMACY CLAUSE DEPRIVES STATE OFFICERS OF ANY LAWFUL AUTHORITY TO VIOLATE FEDERAL LAW AND REQUIRES PROSPECTIVE COERCIVE RELIEF

a. *Ex parte Young* Held That the Eleventh Amendment Does Not Bar a Suit for Federal Injunctive Relief Against a State Officer

As then-Justice Rehnquist wrote for this Court 35 years ago,

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Edelman v. Jordan, 415 U.S. 651, 664 (1974). At the heart of *Ex parte Young* and its companion case, *General Oil Co. v. Crain*, 209 U.S. 211 (1908), is the premise that "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme

law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). As Justice McKenna explained in *Crain*, "Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers." 209 U.S. at 226; *see also Ex parte Young*, 209 U.S. at 159 ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.").

Ex parte Young and *Crain* thereby solidified as constitutional law a principle that had been repeatedly suggested in prior cases, i.e., "that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of [the Eleventh A]mendment." *Smyth v. Ames*, 169 U.S. 466, 518–19 (1898); *see also Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 389–90 (1894); *Pennoyer v. McConnaughy*, 140 U.S. 1, 9 (1891); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 868 (1824) (Marshall, C.J.) (rejecting the argument that "a void act can afford any protection to the officers who execute it"); *cf. United States v. Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the

exercise of the authority which it gives."). In that regard, *Ex parte Young* was nothing more than an application of the conclusion the Court had already reached in *McConnaughy*, *Reagan*, and *Smyth*, albeit one that was only the more significant in light of the Court's broad construction of the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890). *See generally* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (highlighting the relationship between *Hans* and *Young*).

The animating idea behind *Ex parte Young* is a "basic principle of federal law," *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment), that "has become bedrock," Barry Friedman, *The Story of Ex parte* Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247, 247 (Judith Resnik & Vicki C. Jackson eds., 2009); *see also* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 908–12 (2000) (describing the significance of *Ex parte Young* in the context of modern doctrine). More than that, it has proved "indispensable to the establishment of constitutional government and the rule of law." WRIGHT & KANE, *supra*, at 14. Simply put, "The doctrine of *Ex parte Young* . . . ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

b. *Ex parte Young* Established That the Supremacy Clause Divests State Officers of Any Authority To Violate Federal Law and Must Be Prospectively Enforceable

In recognizing such a "necessary exception to Eleventh Amendment immunity," *id.*, the *Ex parte Young* Court relied, as *Smyth v. Ames* had before it, on the Supremacy Clause of Article VI. *See, e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."); *Smyth*, 169 U.S. at 527 ("No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case, for that would make the state legislature the final judge of the validity of its enactment . . . ."). As Justice Peckham explained in *Ex parte Young*,

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)). Thus, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives

life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1154–55 (1989) (explaining the constitutional significance of the *Young* rationale).

That the availability of relief under *Ex parte Young* is required to vindicate the Supremacy Clause is perhaps nowhere better reflected than in those cases in which this Court has *declined* to apply the 1908 decision. In *Pennhurst*, for example, the question was whether *Ex parte Young* could be invoked to pursue injunctive relief against state officers for violations of *state* law. Writing for the Court, Justice Powell answered that question in the negative. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103–06 (1984). In his words, "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106; *see also* Jackson, *supra*, at 990 ("[In *Pennhurst*], it was not history and remedial traditions, but rather the supremacy of federal law, that justified *Ex parte Young* actions for injunctive relief under federal law but not for injunctive relief under state law.").

To similar effect, *Edelman v. Jordan*, which reaffirmed *Ex parte Young* within its longstanding, necessary bounds but declined to extend it to claims seeking retrospective relief, was expressly grounded in the Supremacy Clause. *See, e.g.*, *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 664–68. As *Ex parte*

Young itself suggested, the supremacy of federal law might not be as squarely threatened in cases where an ongoing violation of federal law was not at issue. *See, e.g.*, *Ex parte Young*, 209 U.S. at 192 ("There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.").

Finally, this Court's more recent holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress can displace *Ex parte Young* by enacting a "carefully crafted and intricate remedial scheme," *see id.* at 73–74, is also consistent with the Supremacy Clause principles at the heart of *Ex parte Young* and its progeny. Whatever may be said about the adequacy of such alternative remedies, the very *creation* by Congress of a federal remedial scheme alleviates the central concern behind *Ex parte Young*—i.e., that the Eleventh Amendment would otherwise insulate states from being compelled by effective federal judicial relief to abandon ongoing violations of federal law and prospectively comply with that supreme law.

c. This Court Has Consistently and Repeatedly Reiterated Both the Scope and the Significance of This Rule

Time and time again, this Court has repeatedly defended both the substance and the significance of the *Ex parte Young* doctrine's core holding: that

suits for *prospective* relief against state officers for violations of *federal* law do not run afoul of the Eleventh Amendment. *See, e.g.*, *Verizon*, 535 U.S. at 645. *See generally* Friedman, *supra*, at 273 ("[T]he core of *Ex parte Young* remains and even has been expanded."). Few doctrines of constitutional law have remained as stable, settled, and unquestioned for over 100 years as has *Ex Parte Young*'s rule that state officers must be subject to suits for prospective relief to eliminate ongoing violations of supreme federal law, unless Congress has afforded some alternative remedy to secure ongoing compliance with the demands of the Supremacy Clause. *Edelman* itself is instructive, for even while acknowledging that the difference between retroactive and prospective relief that it articulated "will not in many instances be that between day and night," 415 U.S. at 667, the Court nevertheless stressed that such a distinction would not immunize the states from their obligation to comply with *any* federal court orders with pecuniary consequences (e.g., those awarding attorney's fees, *see Hutto v. Finney*, 437 U.S. 678, 690 (1978)).

Indeed, so long as the lawsuit seeks prospective relief against a state officer for a violation of federal law, this Court's jurisprudence is unequivocal: the Supremacy Clause compels the availability of a federal court remedy, and federal judges are authorized, notwithstanding anything in the Eleventh Amendment, to secure prospective compliance with federal law. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977). That is what *Ex parte Young* has required—and provided—for more than a century.

II. Relief Under *Ex parte Young* Cannot Turn—and Has Never Turned—on the Identity of the Plaintiff

a. This Court Has Never Suggested that the Identity of the Plaintiff Has Any Bearing on the Availability of Relief Under *Ex parte Young*

Because *Ex parte Young* stands for the Supremacy Clause-based principle that states have no authority to empower their officers to continue to act in violation of federal law, this Court has never suggested that its applicability turns on the identity of the plaintiff. Rather, as Justice Scalia has explained, "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original)).

To that end, this Court has routinely applied the rule of *Ex parte Young* without any special comment where the plaintiff is a private corporation. *See, e.g.*, *Verizon*, 535 U.S. 635; *S. Covington & Cincinnati St. Ry. Co. v. City of Covington*, 235 U.S. 537 (1915). Such decisions reflect and enforce the principle underlying the *Ex parte Young* doctrine, i.e., that it is the need to enjoin ongoing violations of federal law—and not any concern with whom the plaintiff might be—that warrants treating persons responsible for such ongoing violations as private individuals, not alter egos of the state.

"Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 293 ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar.").

This Court's rejection of any notion that only natural-born persons may invoke *Ex parte Young* makes eminent good sense, because the threat to federal supremacy has nothing to do whatsoever with the identity of the plaintiff. *Any* ongoing violation of federal law by a state officer threatens the supremacy of that law—and of federal authority writ large. *See, e.g.*, Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126–32 (1996) (noting the continuing significance—and vitality—of *Ex parte Young* after *Seminole Tribe*).

b. *Coeur d'Alene* Did Not Erode *Ex Parte Young*

The conclusion that it is these fundamental principles—and only these—that govern the scope of *Ex parte Young* is not called into question by this Court's decision in *Coeur d'Alene*. Although Justice Kennedy's opinion in that case suggested that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction," 521 U.S. at 270 (opinion of Kennedy, J.),[2] the three other Justices

[2] Justice Kennedy returned to this theme in *Verizon*. *See* 535 U.S. at 649 (Kennedy, J., concurring) ("In my view, our *Ex*

whose votes formed the majority declined to endorse such an approach.

Instead, the concurring Justices suggested that "the principal opinion is flawed in several respects," *id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment), not the least of which was its proposal "that a case-by-case balancing approach is appropriate where a plaintiff invokes the *Young* exception to the Eleventh Amendment's jurisdictional bar, even when a complaint clearly alleges a violation of federal law and clearly seeks prospective relief." *Id.* at 293–94; *see also id.* at 295 ("Our case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed."). Thus, seven members of this Court in *Coeur d'Alene* agreed that *Ex parte Young* was left fully intact and unaffected by the decision there, while a different majority (of five Justices) held simply that actions in the nature of quiet title to submerged lands owned by the state involved effectively more than just prospective coercive relief, and were therefore beyond the boundary marked out by *Ex parte Young* and its progeny.

Any doubt that *Young*'s central principles survived *Coeur d'Alene* intact has been eliminated by subsequent case law in this Court, as further reflected in the uniform decisions of the Courts of Appeals. In *Verizon*, for example, Justice Scalia specifically rejected Maryland's suggestion that *Coeur d'Alene* had fundamentally altered the nature of *Ex parte Young* actions, reiterating that "the inquiry into

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parte Young jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law.").

whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," 535 U.S. at 646, and instead turns only on the traditional factors. *See also Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (holding that an action to enforce a consent decree could be brought under *Ex parte Young*, and not even citing *Coeur d'Alene*). *See generally* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 42–51 (1998) (arguing for, and justifying, a limited reading of *Coeur d'Alene*).

In addition to this Court (and with the exception of the Fourth Circuit in this case), every Court of Appeals to reach the issue has held that (1) *Coeur d'Alene* did not upset the settled rule under *Ex parte Young* that federal courts generally have jurisdiction over all suits against state officers for prospective relief to enforce compliance with federal law; and (2) *Coeur d'Alene*'s holding narrowly applies only to claims that are (as was the plaintiffs' claim there) the functional equivalent of a quiet title action. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *In re Deposit Ins. Agency*, 482 F.3d 612 (2d Cir. 2007); *MCI Telecomms. Corp. v. Bell Atl. Pa.*, 271 F.3d 491 (3d Cir. 2001); *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407 (5th Cir. 2004); *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610 (6th Cir. 2003); *Ameritech Corp. v. McCann*, 297 F.3d 582 (7th Cir. 2002); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004); *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269 (11th Cir. 2002); *Vann v. Kempthorne*, 534

F.3d 741 (D.C. Cir. 2008); *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334 (Fed. Cir. 2006).

The upshot of these cases is simple: the fundamental Supremacy Clause principles behind the *Ex parte Young* doctrine remain intact and highly stable today, over a century after their enunciation. Any plaintiff who seeks prospective relief from a state officer based on an alleged violation of federal law will not be precluded by the Eleventh Amendment from pursuing such a claim in federal court.

III. The Decision Below Risks Fundamentally Undermining Both the Logical Premise and the Animating Purpose of *Ex parte Young*

a. The Court of Appeals Erroneously Treated This Suit as Expanding *Ex parte Young*

Notwithstanding these clear, well-established, and time-tested principles, the Court of Appeals in this case announced a heretofore undiscovered destabilizing exception that threatens substantial harm to well-settled doctrine, holding that *Ex parte Young* depends on the identity of the *plaintiff*, and does not afford any remedies for ongoing violations of federal law in suits by state-created agencies specifically authorized by Congress to enforce federal law. *See Reinhard*, 568 F.3d 110.

Treating *Ex parte Young* as a grave departure from the constitutional plan that needs to be narrowed and cabined, the Court of Appeals reasoned that "while no subsequent decision has expressly limited the application of *Ex parte Young* to suit by

a private plaintiff, many decisions have recognized this basic element of the doctrine," *id.* at 118, i.e., that the plaintiff must be a private (albeit not natural-born) person. It reached this result notwithstanding that not a single case it cited had ever addressed the issue of whether the doctrine was limited to suits by "a *private* plaintiff," much less so decided, and without explaining how such a limitation could be reconciled with the theory underlying the doctrine, which sounds in the need to enforce supreme federal law simpliciter. The panel simply seized on a handful of cases that had, in passing, used the word "individual" as an entirely descriptive synonym for "plaintiff." *See id.* at 118.[3]

Relying heavily on *Coeur d'Alene*, *see, e.g.*, *id.* at 119, the court below maintained that "the infringement on a state's sovereign dignity would be substantial if a state agency, acting unilaterally, could force other state officials to appear before a federal tribunal. . . . Splintering a state's internal authority in this manner would be antithetical to our system of dual sovereignty," *id.* at 120. The court gave no account of the central principles underlying *Ex*

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[3] In addition to an earlier Fourth Circuit decision, the Court of Appeals cited this Court's decisions in *Seminole Tribe*, 517 U.S. at 71 n.14 ("[A]n individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law . . . ."), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001), which referred to *Ex parte Young* actions as suits by "private individuals." Neither of these opinions *decided* that the plaintiff must be private, any more than the same language can be read as deciding that a corporation is not an "individual." There was simply no question presented in either case as to whether *Ex parte Young* could be ignored depending on the identity of the plaintiff; in each case the word "individual" was merely used synonymously with "person" or "plaintiff."

Parte Young, or how they were even remotely consistent with the novel distinction the court was articulating.

Instead, the Court of Appeals asserted that it was simply declining to "expand" *Ex parte Young* into a "new" context. *See id.* at 125 ("[E]xpanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." (quoting *Coeur d'Alene*, 521 U.S. at 270) (alteration in original)); *id.* at 119 ("[W]e are convinced that the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court."); *see also id.* at 118 ("This lack of historical support . . . is important in light of the Supreme Court's presumption that the states are immune from proceedings that were 'anomalous and unheard of when the constitution was adopted.'" (quoting *Alden*, 527 U.S. at 727)).[4]

b. To the Contrary, this Lawsuit Falls Within the Heart of *Ex parte Young*

As should be clear from the above discussion, the Court of Appeals erred in its insistence that claims by state-created agencies would represent an "expansion" of *Ex parte Young*. Quite to the contrary, the petitioner's complaint clearly "alleges an ongoing violation of federal law and seeks relief

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[4] In a similar case, the Seventh Circuit also suggested that a state-created agency could not bring a lawsuit under *Ex parte Young*. *See Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 573 F.3d 548 (7th Cir. 2009). There, though, the plaintiffs were not pursuing injunctive relief against any individual state officers, *see id.* at 553, and so the court's observations were necessarily dicta.

properly characterized as prospective." *Verizon*, 535 U.S. at 645. Under this Court's long-settled doctrine, that is all that *Ex parte Young* requires, because that is precisely the conduct that necessitates a coercive, prospective remedy to ensure compliance with federal law. While it may be true as a descriptive matter that there is little precedent for allowing *Ex parte Young* suits by public agencies,[6] that factual anomaly is legally beside the point.

c. The Distinction Drawn by the Court of Appeals is Unsupported by the Supremacy Clause, and Would Jeopardize the Supremacy of Federal Law

The Court of Appeals itself conceded that "*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." *Reinhard*, 568 F.3d at 119. If that is true—and it clearly is—then it is difficult to see how the Supremacy Clause could possibly countenance the distinction that would result from the Court of Appeals' decision in this case. Under the Court of Appeals' reasoning, the availability of relief against a state officer for violations of the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51, turns on whether the state has chosen to create a private protection and advocacy system rather than a public one. To give states that have accepted substantial

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[6] The Second Circuit, at least, has expressed no hesitation in allowing state-created agencies under the statute at issue here—the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51—to sue appropriate state officials under § 1983. *See, e.g.*, *Prot. & Advocacy for Persons With Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.).

federal funds in exchange for certain promises such indirect but unavoidable control over their amenability to prospective relief turns the Eleventh Amendment into a means of avoiding compliance with federal law—the very evil that *Ex parte Young* exists to prevent.

The only justification suggested by the Court of Appeals for such an indefensible distinction was its assertion that "federal court adjudication of an 'intramural contest' between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff." *Reinhard*, 568 F.3d at 119–20. Even if this sentiment were accurate in different circumstances (and *amici* believe that it is not), such an argument is wholly unpersuasive in the general context of Spending Clause legislation and the particular context of the PAIMI Act. In such cases, Congress has given states the choice of complying with federal policy or not, and under the PAIMI Act specifically, those states that choose to accept funding are given the further choice of creating a private or public protection and advocacy system, so long as the agency created is ready and able to enforce the federal requirements attached to the grants. In such circumstances, actions under *Ex parte Young* are perhaps the exclusive legal means by which the state can be kept to its word—and to the mandate of the federal program with which it chose to comply.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for a writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit should be granted.

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APPENDIX

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,
Petitioner,

v.

JAMES S. REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE NEW JERSEY PUBLIC ADVOCATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

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INTEREST OF AMICUS CURIAE[1]

The Department of the Public Advocate of the State of New Jersey is charged by state law with advocating the "public interest" on behalf of New Jersey residents, including the elderly, people with mental illness or developmental disabilities, consumers, and children. New Jersey law provides that the Public Advocate may "represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest," and defines public interest to include "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States." N.J. Stat. Ann. §§ 52:27EE-12, -57. The Public Advocate is one of many state agencies throughout the United States charged with enforcing state and federal rights in both state and federal court—and against both private defendants and state officials.

In the decision below, the Fourth Circuit incorrectly ruled that a federal forum is not available to state plaintiffs seeking to enjoin individual state officials to comply with federal law. In particular, the court of appeals held that the Virginia Office of Protection and Advocacy ("VOPA") could not, as a state agency, bring a suit in federal court to require individual state officials to provide VOPA with records to which VOPA was entitled under federal law. *See* 42

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

U.S.C. § 10805(a). The Fourth Circuit so held despite explicitly acknowledging that a private plaintiff could bring a suit under *Ex parte Young*, 209 U.S. 123 (1908), to enjoin prospective compliance with federal law by state officials, in precisely those circumstances.

The Fourth Circuit's decision could disrupt enforcement systems duly enacted by New Jersey and other states. The Public Advocate submits this *amicus curiae* brief to offer the Court an informed perspective on how the court of appeals' decision could undermine the protection and advocacy agencies that states have chosen to establish.

SUMMARY OF ARGUMENT

The decision below turned state sovereign-immunity principles on their head, jurisdictionally handicapping states in the name of protecting these same states—potentially upsetting state statutory frameworks governing state agencies charged with protecting vulnerable state citizens. The Fourth Circuit held that the long-standing doctrine of *Ex parte Young* is not available to states in circumstances where that same doctrine unquestionably would be available to private plaintiffs. This holding directly curtailed the enforcement powers of the state protection and advocacy agency established by the Commonwealth of Virginia, and endangers the powers of similar state agencies invested by states with the authority to enforce federal law in federal court against lawbreaking state officials.

The Fourth Circuit incorrectly applied the established rules of state sovereign immunity—rules that protect states from being named as *defendants* in certain private suits but do not limit the ability of states to

bring claims as *plaintiffs*—and created a new "state intramural dispute" exception to *Ex parte Young*. This unprecedented exception ignores that a suit against an individual official is *not* a suit against the state.

Moreover, discrimination against state plaintiffs conflicts with the purpose of state sovereign immunity: safeguarding the "sovereign dignity" of states. *See, e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). The Fourth Circuit's decision to treat state plaintiffs as inferior to private plaintiffs did not "accord[] the States the respect owed them as members of the federation." *Id.* at 748-749.

Amicus curiae Public Advocate of New Jersey respectfully urges the Court to grant the certiorari petition to correct the Fourth Circuit's departure from *Ex parte Young* and the core purpose of state sovereign immunity.

ARGUMENT

I. New Jersey And Other States Chose To Create State Agencies With The Power To Enforce Federal Law In Federal Court—And The Fourth Circuit's Decision Handicaps These State Agencies

A wide range of states have chosen, as a matter of state law, to create state protection and advocacy agencies—including the Public Advocate of New Jersey—to serve the public interest, and have empowered these agencies to enforce federal law in federal court, including against individual state officials. The Fourth Circuit's decision, if applied to all such organizations, would impose a jurisdictional handicap that would impede these state agencies in performing their state duties.

A. The Department Of The Public Advocate Of The State Of New Jersey

In July 2005, after years of vigorous advocacy by a broad coalition of New Jersey citizens, the New Jersey legislature restored the Department of the Public Advocate of the State of New Jersey (the "Public Advocate"). The Public Advocate, which had originally been established by the state of New Jersey in 1974, but was dissolved by the state twenty years later, was restored pursuant to the Public Advocate Restoration Act, with the mandate to "represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest." N.J. Stat. Ann. § 52:27EE-57. The public interest is defined broadly under the New Jersey statute as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States ...." *Id.* § 52:27EE-12.

In restoring the Public Advocate, the New Jersey legislature designated it as New Jersey's Protection and Advocacy Agency within the meaning of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15043(a)(2)(A)(i), hereafter "DD Act") and the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. § 10805(a)(1), hereafter "PAIMI Act"). *See* N.J. Stat. Ann. § 52:27EE-29(b) (designating Public Advocate as mental health protection and advocacy agency); *id.* § 52:27EE-38(b) (designating Public Advocate as protection and advocacy agency for persons with developmental disabilities). The redesignation process transferring the protection and advocacy function (for purposes of receiving federal funding) from the private entity that has been serving that function has not yet been instituted before the federal Department of Health and Human Services, but

the New Jersey legislature clearly intends for that process to occur. *See* N.J. Stat. Ann. §§ 52:27EE-37, -45.

Like VOPA, the Public Advocate is an independent state agency charged with protecting the rights of the state's most vulnerable citizens, including individuals with mental illness or developmental disabilities. *Compare* Va. Code Ann. § 51.5-39.2A *with* N.J. Stat. Ann. §§ 52:27EE-29 to -50. In addition, the Public Advocate includes the state Ombudsman for the Institutionalized Elderly, which is the first responder for reports of elder abuse in the state's nursing homes and other residential settings, and the Corrections Ombudsman, which responds to complaints and disruptions within the state prison system. *See* N.J. Stat. Ann. §§ 52:27EE-65, 52:27G-5.1 to -16, 52:27EE-24 to -28.

B. Every State Has Chosen To Establish A Protection And Advocacy Agency

In a testament to the vitality of the states' interest in protecting their most vulnerable citizens, all fifty states have chosen to accept federal funding under the DD and PAIMI Acts and to establish protection and advocacy systems, many of which are authorized by state statute to litigate federal claims in federal court.[2]

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[2] *Amicus* Public Advocate does not address whether the states' decisions to create protection and advocacy systems constitute waivers of Eleventh Amendment immunity that would permit suits against the states themselves for money damages. The key point here is that states have chosen to vest state agencies with the power to ask federal courts to enjoin compliance with federal law by lawbreaking state officials. The states' decisions to authorize suits by state agencies to secure prospective compliance with federal law fall within the classic *Ex parte Young* model, and do not implicate waiver issues.

See generally U.S. Dep't of Health & Human Servs., List of State Protection and Advocacy Agencies, *at* http://www.acf.hhs.gov/programs/add/states/pas.html (last updated Nov. 27, 2009).

Congress enacted the DD Act following the discovery of "inhumane and despicable conditions" at a state-operated facility for persons with developmental disabilities. *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996). The PAIMI Act similarly resulted from a Congressional inquiry into conditions at state-operated psychiatric facilities. *See* S. Rep. No. 99-109, *reprinted in* 1986 U.S.C.C.A.N. 1361, 1985.

These Acts allow states to establish either state-operated or private protection and advocacy agencies, and do not draw any distinction between the powers or responsibilities of public and private agencies. Many states (and territories) have established independent state agencies, rather than private nonprofit agencies, to carry out the protection and advocacy functions. These states and territories include Alabama (established by unpublished Governor's directive), American Samoa (Am. Samoa Code Ann. c. 14, §§ 4.1401 *et seq.*), Connecticut (Conn. Gen. Stat. §§ 46a-7 *et seq.*), Indiana (Ind. Code §§ 12-28-1-1 *et seq.*), Kentucky (Ky. Rev. Stat. Ann. §§ 31.010 *et seq.*), North Dakota (N.D. Cent. Code §§ 25-01.3-01 *et seq.*), Ohio (Ohio Rev. Code Ann. §§ 5123.60 *et seq.*), Puerto Rico (P.R. Laws Ann. tit. 3, ch. 24A, §§ 532 *et seq.*) and Virginia (Va. Code Ann. § 51.5-39.2A).

States have authorized protection and advocacy agencies to bring federal claims *in federal court*. *See, e.g.*, Va. Code Ann. § 51.5-39.2A (VOPA may employ counsel "to initiate actions on behalf of the Office ... in

any matter, including state, *federal* and administrative proceedings" (emphasis added)); Conn. Gen. Stat. § 46a-11 (The Connecticut Office of Protection and Advocacy for Persons with Disabilities may bring an action in "*any court*, agency, board or commission in this state" (emphasis added)); N.D. Cent. Code § 25-01.3-06 (The North Dakota Committee on Protection and Advocacy may "[p]ursue legal, administrative, and other appropriate remedies to ensure the protection and the rights of persons with developmental disabilities or mental illnesses ... *in a federal* or state court ...." (emphasis added)).

II. The Fourth Circuit Ruling Departs From Long-Standing Precedent And Disadvantages States As Compared To Private Plaintiffs

The Fourth Circuit's ruling could disrupt the statutory frameworks described above, without any basis for such disruption in the doctrine of state sovereign immunity. The Circuit's ruling suffers from two basic legal errors. First, under the long-standing rule of *Ex parte Young*, a suit against a state officer is *not* a suit against a state, and the Circuit thus miscast this case as an "intramural dispute." Second, the decision treats states as inferior to private individuals in their ability to invoke the *Ex parte Young* doctrine, and thus conflicts with what this Court has described as the animating purpose of state sovereign immunity: respecting the dignity of states.

The Fourth Circuit's decision would, if applied more broadly, fracture the *Ex parte Young* doctrine, undermining decades of this Court's precedent guaranteeing aggrieved parties access to federal courts to ensure that state officials conform their future conduct to governing federal law. This Court should grant the

writ here to correct the Fourth Circuit's erroneous decision depriving state agencies—and only state agencies—of the fundamental right of access to a federal forum to enforce federal law.

A. The Circuit Miscast This Case As An "Intramural Dispute," Creating A New And Legally Unwarranted Exception To The Rule Of *Ex parte Young*

The Fourth Circuit's decision effectively reverses-in-part the century-old rule of *Ex parte Young*, which holds that a suit against a state officer, seeking prospective compliance with federal law, rather than damages for past misconduct, is not to be treated as a suit against the state itself. As this Court held, "[T]he use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159-160. This logic applies with equal force where the state is the plaintiff, and the Circuit erred by holding otherwise.

1. A suit against an individual for injunctive relief is not a suit against the state

The distinction established in *Ex parte Young* separates individuals from the state, to "ensure[] that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("*Young* and its progeny render the [Eleventh] Amendment wholly inapplicable to a certain class of suits. Such suits are

deemed to be against officials and not the States or their agencies[.]").[3]

Following *Ex parte Young*, this Court has consistently allowed suits against state officials for prospective relief from violations of federal law, because they are not suits against the state. *See Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte*

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[3] *See also Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex parte Young* created an exception to [sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) ("[T]he Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials[.]"); *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State."); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Petitioner's right to maintain this action in a federal court depends, first, upon whether the action is against the State of Indiana or against an individual.... Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932) ("The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief."); *Truax* v. *Raich*, 239 U.S. 33, 37 (1915) ("As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of state, are about to proceed wrongfully to the complainant's injury ... it is established that the suit cannot be regarded as one against the state.").

Young avoids an Eleventh Amendment bar to a suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (alteration in original; internal quotation marks omitted)).[4]

The distinction between the state and individual officials as defendants is pellucid in cases that have mixed both types of claims: this Court rejects claims against the state and allows claims for prospective relief against individuals. *See, e.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 277-278 (1986) (rejecting retroactive award of monetary relief from state treasury but allowing claim for an injunction against officials); *Alabama* v. *Pugh*, 438 U.S. 781, 781-782 (1978) (per curiam) (allowing suit against individual defendants while dismissing identical claims against state).

This Court has recognized that in certain limited circumstances, the nature of the relief sought may be qualitatively different from conventional injunctive relief, such that the *Ex parte Young* rule may not apply.

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[4] *See also Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) ("a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law"); *Hutto* v. *Finney*, 437 U.S. at 690 (permitting financial penalty to enforce injunction of state officials); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 n.6 (1978) (refusing to overrule *Ex parte Young* or restrict its application); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (*Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law"); *Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (rejecting defendants' contention that "a suit to restrain state officials from enforcing unconstitutional state laws is, in effect, a suit against the state").

See, e.g., *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (suit seeking title to state land). But this case does not present such an unconventional request for relief: the Fourth Circuit itself recognized that a private plaintiff could invoke *Ex parte Young* in precisely the circumstances present here. *See Virginia* v. *Reinhard*, 568 F.3d 110, 119 (4th Cir. 2009); *see also infra* Part II.B.

Nor are decisions addressing *damages* requests (*Alden* v. *Maine*, 527 U.S. 706 (1999)) or injunctions seeking to enforce *state* law (*Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)) relevant to the analysis of a suit seeking an *injunction* to enforce *federal* law, and the Circuit erred by relying on such authority. The Circuit's professed justification for citing such cases—*i.e.*, to protect the states from "excessive federal meddling with their internal authority"—runs aground on the simple fact that here Virginia itself chose to vest VOPA with the authority to litigate federal claims in federal court; this state choice is entitled to respect, and distinguishes this case from cases such as *Alden* and *Pennhurst*.

In short, the century-old rule of *Ex parte Young*, properly applied, resolves this case. Because VOPA's suit seeks prospective relief requiring individual defendants to comply with federal law, it is not a suit against a state and is not barred by the Eleventh Amendment.

2. There is no intramural dispute because the state is not a defendant

The Court of Appeals incorrectly assumed that this suit presents an "intramural state dispute," *Reinhard*, 568 F.3d at 113, or "intramural contest," *id.* at 119, or "internecine feud," *id.* at 121, in which the plaintiffs

seek "to turn the State against itself," *id.* at 120, 121, and have a federal court "referee contests between [state] agencies," *id.* at 121.[5] That might be the case if plaintiffs had sued a state agency. But *Ex parte Young* makes clear that the state is not a defendant in this suit. VOPA seeks to enforce federal requirements against individual state officers who have allegedly deviated from these binding requirements. The suit presents a contest between VOPA and allegedly law-breaking individual defendants—not the state against "itself."

Correctly identifying the defendants in this case removes the false premise supporting the court of appeals' decision, and with that premise removed, the decision collapses. No decision of this Court bars a state protection and enforcement agency from carrying out its state-authorized mission of suing individuals who violate federal law and thereby harm vulnerable state citizens.

Indeed, the decision below cited no precedent explicitly recognizing an "intramural" exception to *Ex*

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[5] To the extent that the Fourth Circuit suggested that adversarial proceedings brought by one state agency against an official employed by another state agency are not justiciable as an "intra-branch dispute," it is incorrect. Here, the Virginia legislature vested VOPA with the statutory authorization, and indeed responsibility, to initiate adversarial proceedings challenging state officials; that VOPA is itself a state agency does not affect its Article III standing or otherwise render the dispute nonjusticiable. *See, e.g., United States* v. *Nixon*, 418 U.S. 683 (1974) (where Attorney General's regulations empowered Special Prosecutor to contest President's invocation of executive privilege, justiciable case or controversy existed even though Special Prosecutor was official of Executive Branch).

parte Young. Instead, the court of appeals sought to extrapolate this exception from loose language and unrelated holdings in several cases involving municipalities in which the Court rejected plaintiffs' claims to federal rights enforceable in *any court*. *See Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (plaintiff has no federal constitutional rights against state); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 192 (1923) ("no substantial federal question is presented"); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 15 (1915) ("no Federal question was raised"); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 179-180 (1907) (no violation of federal law); *Reinhard*, 568 F.3d at 122 (plaintiffs in those cases "could not obtain relief under federal law"). This Court determined as a matter of substantive law that no federal rights were violated in those four disputes and did not hold, as a jurisdictional mater, that otherwise-well-pleaded claims were jurisdictionally barred from federal court under sovereign-immunity principles.

These cases are inapposite to the Fourth Circuit's jurisdictional holding and distinguishable on their own terms—as VOPA plainly pleaded an actionable claim for access to records improperly withheld by individual state officials. *See, e.g.*, *Protection & Advocacy for Persons with Disabilities* v. *Mental Health & Addiction Servs.*, 448 F.3d 119, 121 (2d Cir. 2006) (Sotomayor, J.) ("we hold that PAIMI unambiguously grants OPA [a state protection and advocacy agency] access to peer review records and affirm the district court's entry of a declaration and injunction requiring the Department to disclose to OPA the peer review records" regarding two deaths); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houston*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) ("PAIMI requires that an organization such as a PP & A be given access to peer review reports such as those

at issue [regarding patient's death] irrespective of state law."); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 499 (11th Cir. 1996) (enjoining defendant from failing to release records to state protection and advocacy program). Indeed, the court of appeals stated that "VOPA can enforce federal law in state court," *Reinhard*, 568 F.3d at 124, but failed to recognize that the existence of an enforceable federal right is inconsistent with every case it cited for the "intramural" rule.

B. The Fourth Circuit Rule Denies States The Same Rights Afforded To Private Plaintiffs, Undercutting The Sovereign Dignity Of States

The consequence of the court of appeals' decision is that, in the name of respect for states, it denies state plaintiffs rights afforded to private plaintiffs. The Circuit acknowledged that "*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system," *Reinhard*, 568 F.3d at 119, but proceeded to dismiss the suit because it was filed by a state agency. This ignores this Court's clear pronouncements that state sovereign immunity is designed to protect the dignity interests of states; by discriminating against state plaintiffs, the Circuit's decision turns these principles on their head.

1. The Fourth Circuit rule discriminates against state plaintiffs, contrary to the decisions of this Court

This Court has repeatedly held that the sovereignty of states encompasses the power to sue. *See, e.g.*, *Massachusetts* v. *Environmental Prot. Agency*, 549 U.S. 497, 518-520 (2007); *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600-608

(1982) (tracing long history of states' power to sue to prevent injury to their citizens).

Indeed, in its decisions on standing, the Court has confronted directly the comparison between state plaintiffs and private plaintiffs and held that sovereignty entitles state plaintiffs to "special solicitude" when they seek access to federal courts. *Massachusetts*, 549 U.S. at 520; *see also id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual."). "At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." *Alfred L. Snapp & Son*, 458 U.S. at 611 (Brennan, J., joined by Marshall, Blackmun, Stevens, JJ., concurring).

Against this backdrop, the participation of the state as the *plaintiff* in a lawsuit against a state officer does not offend sovereign immunity. *Cf. Alden*, 527 U.S. at 713 ("the States' immunity *from suit* is a fundamental aspect of [their] sovereignty" (emphasis added)). Indeed, the founders explicitly distinguished between suits against states, which infringe state sovereignty, and suits by states, which do not. *See* 3 *Debates on the Federal Constitution* 556 (J. Elliot 2d ed. 1854) (John Marshall stating "I see a difficulty in making a state defendant, which does not prevent its being plaintiff," *quoted in Alden*, 527 U.S. at 718 (1999)).

To support its unprecedented discrimination against state plaintiffs, the court of appeals cited isolated statements in two footnotes from this Court's decisions: *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.14 (1996) ("an *individual* can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law" (emphasis added));

Board of Trs. of Univ. of Ala. v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (referring to *Ex parte Young* suits by "private individuals"). From these references, the court of appeals concluded that discrimination against state plaintiffs was a "basic element" of *Ex parte Young* doctrine. *Reinhard*, 568 F.3d at 118.

These footnotes refer to the use of *Ex parte Young* by "individuals" for the simple reason that sovereign immunity itself has often been summarized as protection of states against suit by individuals. The articulated purpose of state sovereign immunity is to protect states against the "indignity" of *being sued by private plaintiffs* in certain circumstances. *See, e.g.*, *Alden*, 527 U.S. at 715 ("The generation that designed and adopted our federal system considered immunity *from private suits* central to sovereign dignity." (emphasis added)); *Board of Trs.*, 531 U.S. at 363 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."); *Alabama* v. *Pugh*, 438 U.S. at 781 (per curiam) ("[T]he Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies."); *Ex parte Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."); *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.").

Nothing in these decisions—or their supporting rationale—limits states' ability to act as plaintiffs. The Fourth Circuit's over-reading of the language in these cases subverts their basic goal of safeguarding the dignity and sovereignty of states.

Indeed, if the court of appeals were correct that a limitation to private plaintiffs were "a basic element of the [*Ex parte Young*] doctrine," *Reinhard*, 568 F.3d at 118, then this Court's extensive and divided analysis in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) would have been unnecessary because the plaintiff was not a private plaintiff but a sovereign tribe, a party analogous to a sovereign state. *See id.* at 268. Instead of resolving the case by reference to the plaintiff's identity, however, this Court held that the outcome depended on "the difference between the *type of relief* barred by the Eleventh Amendment and that permitted under *Ex parte Young*." *Id.* at 281 (emphasis added).

Again, the doctrinal focus is on protecting states as *defendants* from private suits—not restricting states as *plaintiffs*. It hardly promotes the interests of federalism and state autonomy when, in the name of state sovereignty, a court thwarts the intent of the legislature of the very state it is purportedly seeking to protect.

2. States' choices to create and define state enforcement agencies deserve respect

The Fourth Circuit acknowledged that Virginia's sovereignty is not harmed when private nonprofit agencies and individuals bring suit against individual officials. *See Reinhard*, 568 F.3d at 119. Under the Circuit's logic, if Virginia had chosen to vest a private nonprofit organization with the protection and advocacy powers enabled by the PAIMI Act, this private nonprofit could bring *in federal court* the very same suit that VOPA was prohibited from pursuing. To treat Virginia's choice to implement the PAIMI Act through a state agency, rather than a private nonprofit organization, as somehow raising a bar to federal juris-

diction, conflicts with the basic purpose of state sovereign immunity: according states respect. Virginia made a *state* choice to create a *state* agency, and this choice deserves respect. The Fourth Circuit derogates this choice by posing barriers to the federal litigation of federal rights when state agencies sue for prospective injunctive relief, but not when private agencies do so.

Such state choices reflect due consideration for the special circumstances presented by suits involving public officials, while permitting such suits to proceed in federal court. New Jersey law, for example, requires notice to public defendants before suit: "Prior to initiating litigation, the Public Advocate shall communicate, in writing, with a public entity against which the Public Advocate anticipates filing adversarial action ... to clearly provide the potential litigants with a final opportunity to resolve the matters in controversy outside the court system." N.J. Stat. Ann. § 57:27EE-78.

These state provisions, duly enacted by the state legislature and the state executive, provide the appropriate means for the state to exercise its sovereignty and balance the interests presented by suits such as VOPA's. By ignoring states' choices and inventing a new, discriminatory, judge-made exception to *Ex parte Young*, the court of appeals departs from the law and undermines the dignity of states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

Supreme Court, U.S.
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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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U.S. District Court
Eastern District of Virginia – (Richmond)
CIVIL DOCKET FOR CASE #: 3:07-cv-00734-REP

Commonwealth of Virginia, Virginia Office for Protection and Advocacy v. Reinhard et al

Date Filed	#	Docket Text
12/03/2007	1	COMPLAINT against all defendants (Filing fee $ 350 receipt number 300002985), filed by Commonwealth of Virginia, Virginia Office for Protection and Advocacy. (Attachments: # 1 Civil Cover Sheet # 2 Receipt)(cgar,) (Entered: 12/03/2007)
12/03/2007	2	MOTION for Preliminary Injunction by Commonwealth of Virginia, Virginia Office for Protection and Advocacy. (cgar,) (Entered: 12/03/2007)
01/02/2008	8	RESPONSE in Opposition re 2 MOTION for Preliminary Injunction filed by James S. Reinhard, Denise D. Micheletti, Charles M. Davis. (Thro, William) (Entered: 01/02/2008)
02/12/2008	14	ORDER denying without prejudice 2 Motion for Preliminary Injunction; it is also ORDERED that a telephone conference shall be held on 2/14/08 at 11:00 a.m. Signed by Judge Robert E. Payne on 2/12/08. (jtho,) (Entered: 02/12/2008)

02/15/2008	15	ORDER the United States shall be afforded an opportunity to file a brief amicus curiae or to intervene, if and as, the United States shall be so advised, serving copies upon the parties; ORDERED that by 3/6/2008, United States file a statement of its intention to either intervene or to file a brief amicus curiae; Further ORDERED if United States determines to file a brief or to intervene, it shall file a brief addressing the defendants' motion to dismiss, insofar as it shall implicate the interest of the United States by April 14, 2008; Further ORDERED that by April 29, 2008 defendants file response to the position taken by the United States and that by May 14, 2008 the plaintiff file it's response to the position taken by the United States and defendants; Clerk is directed to send copy of this order to all counsel of record and to Debra Prillaman, Esquire, Assistant United States Attorney who shall assure that a copy of this Order is delivered to the appropriate representative of the agency involved and the Department of Justice. Signed by Judge Robert E. Payne on 2/15/2008. (cgar) (Entered: 02/15/2008)

02/15/2008	16	ORDER for Preservation of Records (SEE ORDER FOR DETAILS). Signed by Judge Robert E. Payne on 2/15/2008. (cgar) (Entered: 02/15/2008)
02/15/2008	17	ANSWER to Complaint *and AFFIRMATIVE DEFENSES* by James S. Reinhard, Denise D. Micheletti, Charles M. Davis.(Thro, William) (Entered: 02/15/2008)
03/06/2008	19	STATUS REPORT *and Response to Order of February 15, 2008* by UNITED STATES OF AMERICA. (Prillaman, Debra) (Entered: 03/06/2008)
04/09/2008	20	NOTICE by UNITED STATES OF AMERICA *of its Non-Participation in this Action* (Prillaman, Debra) (Entered: 04/09/2008)
05/19/2008	22	MOTION to Dismiss *and Memorandum in Support of Renewed Motion to Dismiss* by James S. Reinhard, Denise D. Micheletti, Charles M. Davis. (Thro, William) (Entered: 05/19/2008)
05/30/2008	23	RESPONSE in Opposition re 22 MOTION to Dismiss *and Memorandum in Support of Renewed Motion to Dismiss* filed by Commonwealth of Virginia, Virginia Office for Protection and Advocacy. (Buckley, Paul) (Entered: 05/30/2008)

06/04/2008	24	REPLY to Response to Motion re 22 MOTION to Dismiss *and Memorandum in Support of Renewed Motion to Dismiss* filed by Commonwealth of Virginia, Virginia Office for Protection and Advocacy. (Tysinger, Allyson) (Entered: 06/04/2008)
07/03/2008	26	STATUS REPORT by James S. Reinhard, Denise D. Micheletti, Charles M. Davis. (Thro, William) (Entered: 07/03/2008)
07/18/2008	27	MEMORANDUM OPINION. Signed by District Judge Robert E. Payne on 7/18/2008. (cgar) (Entered: 07/18/2008)
07/18/2008	28	ORDER denying 22 Renewed Motion to Dismiss. Signed by District Judge Robert E. Payne on 7/18/2008. (cgar) (Entered: 07/18/2008)
07/25/2008	29	MOTION for Summary Judgment and Memorandum in Support by Commonwealth of Virginia, Virginia Office for Protection and Advocacy. (Buckley, Paul) Modified on 7/29/2008 (cgar). (Entered: 07/25/2008)
07/29/2008	30	NOTICE OF INTERLOCUTORY APPEAL as to 28 Order on Motion to Dismiss, 27 Memorandum & Opinion by James S. Reinhard, Denise D. Micheletti, Charles M.

		Davis. (Thro, William) Modified on 7/30/2008 (cgar). (Entered: 07/29/2008)
07/31/2008	33	MOTION to Stay all Proceedings Pending Appeal by James S. Reinhard, Denise D. Micheletti and Charles M. Davis. (cgar) (Entered: 08/01/2008)
09/09/2008	34	ORDER withdrawing without prejudice 29 Motion for Summary Judgment pending resolution of interlocutory appeal; granting 33 Motion to Stay All Proceedings pending resolution of interlocutory appeal. Signed by District Judge Robert E. Payne on 9/8/2008. (cgar) (Entered: 09/09/2008)
08/07/2009	39	USCA Mandate re 30 Notice of Appeal :The judgment of this Court, entered 6/02/09, takes effect today. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. (lbre,) (Entered: 08/10/2009)
08/24/2009	40	ORDER above-captioned matter is dismissed with prejudice. Signed by District Judge Robert E. Payne on 8/24/2009. (cgar) (Entered: 08/24/2009)

General Docket
United States Court of Appeals
for the Fourth Circuit

Court of Appeals Docket #: 08-1845

Commonwealth of Virginia v. James Reinhard

08/07/2008	1	Case docketed. Originating case number: 3:07-cv-00734-REP. Case manager: JMoore. Date notice of appeal filed: 07/29/2008 [08-1845] (JHM)
10/16/2008	16	Corrected BRIEF filed by Appellants Charles M. Davis, Denise D. Micheletti and James Reinhard in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 10/16/2008. [9979579O3] [08-1845] (SRM)
11/17/2008	19	BRIEF filed by Appellee Commonwealth of Virginia in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: hand delivery. [997978486] [08-1845] (PJB)
12/04/2008	29	ORDER filed [997989220] granting Motion for leave to file amicus curiae [23]; granting Motion for leave to file [25] Copies to all parties. [08-1845] (JHM)
12/05/2008	34	Corrected AMICUS CURIAE/ INTERVENOR BRIEF filed by Amici

Supporting Appellee Alabama Disabilities Advocacy Program, Kentucky Protection and Advocacy, Maryland Disability Law Center, National Disability Rights Network and Office of Protection and Advocacy for Persons with Disabilities in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 11/26/2008. [997990591] [08-1845] (PDC)

01/05/2009 35 BRIEF filed by Appellants Charles M. Davis, Denise D. Micheletti and James Reinhard in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 01/05/2009. [998005968] [08-1845] (SRM)

03/24/2009 42 ORAL ARGUMENT heard before the Honorable J. HARVIE WILKINSON, III, EUGENE EDWARD SILER, JR. and ROBERT J. CONRAD, JR.. Attorneys arguing case: Mr. William Eugene Thro for Appellants James Reinhard, Denise D. Micheletti and Charles M. Davis and Mr. Paul James Buckley for Appellee Commonwealth of Virginia. Courtroom

Deputy: Kevin Burson. [998061611] [08-1845] (KB)

06/02/2009 45 PUBLISHED AUTHORED OPINION filed. Originating case number: 3:07-cv-00734-REP Copies to all parties and the district court/ agency. [998111609] [08-1845] (JHM)

06/02/2009 46 JUDGMENT ORDER filed. Decision: reversed and remanded. Originating case number: 3:07-cv-00734-REP. Entered on Docket Date: 06/02/2009. [998111648] Copies to all parties and the district court/agency. [08-1845] (JHM)

06/16/2009 47 PETITION for rehearing and rehearing en banc filed by Commonwealth of Virginia. [08-1845] (PJB)

06/23/2009 50 NOTICE ISSUED to Charles M. Davis, Denise D. Micheletti and James Reinhard requesting response to Motion for rehearing and rehearing en banc. [08-1845] (JHM)

07/20/2009 55 AMICUS CURIAE/INTERVENOR BRIEF filed by United States as amicus curiae in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/20/2009. [998143322] [08-1845] (ABK)

07/24/2009	57	RESPONSE/ANSWER to rehearing filed by Charles M. Davis, Denise D. Micheletti and James Reinhard. [08-1845] (SRM)
07/30/2009	61	COURT ORDER filed [998151421] denying Motion for rehearing and rehearing en banc [47] Copies to all parties. [08-1845] (JHM)
08/07/2009	62	Mandate issued. Referencing: [46],Judgment Order , [45], Opinion. Originating case number: 3:07-cv-00734-REP [08-1845] (JHM)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. JAMES S. REINHARD, in his official Capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his Official capacity as Director, Central State Hospital, Defendants.	CASE NO. 3:07CV734(REP)

COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

(Filed Dec. 3, 2007)

1. Plaintiff, Virginia Office for Protection and Advocacy (VOPA), brings this action against the

Defendants, James S. Reinhard, Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) (in his official capacity only), Denise D. Micheletti, Director, Central Virginia Training Center (CVTC) (in her official capacity only), and Charles M. Davis, Director, Central State Hospital (CSH) (in his official capacity only) seeking to compel Defendants to provide to VOPA records which VOPA is legally entitled to, in order that VOPA may fulfill its statutory obligations.

2. VOPA has been designated as the Commonwealth of Virginia's Protection and Advocacy (P&A) system for persons with disabilities. Code of Va. § 51.5-39.1, *et seq.*

3. As the State P&A system, VOPA has the responsibility and authority to access records in the course of investigating instances of abuse or neglect of individuals with mental illness. 42 U.S.C. § 15043; 42 U.S.C. §§ 10805, 10806; Code of Va. § 51.5-39.4.

4. VOPA has made repeated requests to Defendants for records which VOPA has authority to access.

5. The Defendants have refused to grant VOPA access to the requested records.

6. VOPA seeks a declaratory judgment that Defendants, by refusing to provide VOPA the requested records, have violated federal law, a preliminary and permanent injunction requiring Defendants to provide the requested records to VOPA forthwith, and a preliminary and permanent injunction forbidding Defendants from interfering, in

any way, with VOPA's statutorily authorized access to records.

JURISDICTION

7. This Court has jurisdiction over the claims brought herein pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201. Plaintiffs bring these claims under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C § 15001, *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 USC § 10801, *et seq.*

VENUE

8. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b) as a substantial portion of the events or omissions giving rise to Plaintiff's cause of action occurred within this judicial district.

PARTIES

9. Plaintiff VOPA is an agency of the Commonwealth of Virginia, created by statute, Chapter 8.1 of Title 51.5, Code of Virginia. VOPA has been designated as the Protection and Advocacy System for persons with disabilities in the Commonwealth of Virginia. Code of Va. §51.5-39.2.

10. Defendant James Reinhard, is the Commissioner, DMHMRSAS. The Central Office, DMHMRSAS, is located in Richmond, Virginia. The Commissioner, DMHMRSAS, is responsible for the

supervision and management of the Department and its state facilities. Code of Va. § 37.2-304.

11. Defendant Denise Micheletti is the Director, CVTC. CVTC is a DMHMRSAS-operated institution for persons with mental retardation located in Amherst County, Virginia. The Director, CVTC, is responsible for "the safe, efficient and effective operation" of the facility and for compliance with "all applicable federal and state statutes, regulations, policies and agreements." Code of Va. § 37.2-707.

12. Defendant Charles Davis is the Director, CSH. CSH is a DMHMRSAS-operated institution for persons with mental illness located in Dinwiddie County, Virginia. The Director, CSH, is responsible for "the safe, efficient and effective operation" of the facility and for compliance with "all applicable federal and state statutes, regulations, policies and agreements." Code of Va. § 37.2-707.

FACTS

13. On or about October 18, 2006, an individual with mental retardation and mental illness hereinafter referred to as "Resident A", died while a resident of CVTC. Resident A had a decades-long documented history at CVTC of ingesting non-edible items. During October 2006, Resident A began to show symptoms of bowel obstruction. He was transported to the hospital. On October 10, 2006, an exploratory laparotomy was performed and two latex gloves were discovered in his intestines. The gloves were surgically removed. Resident A died on October 18, 2006.

14. On or about November 13, 2006, after receiving a report of resident A's death while he was in the custody of DMHMRSAS, VOPA initiated an investigation of the death to determine whether or not the death was a result of abuse or neglect.

15. On November 16, 2006, VOPA requested, in writing, that CVTC provide VOPA with all records related to Resident A's death including any risk management review, baseline analysis review, or mortality review.

16. On June 5, 2007, VOPA renewed its request, in writing, for the report of the baseline analysis review.[1]

17. On July 12, 2007, VOPA renewed its request in writing for the baseline analysis review and risk management review.

18. Defendants have refused to provide records related to Resident A's death requested by VOPA. As a result, VOPA is unable to complete its statutorily authorized investigation into Resident A's death.

19. On or about January 11, 2007, an individual with mental retardation hereinafter referred to as "Resident B" was assaulted at CVTC by another

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[1] [DMHMRSAS] Departmental Instruction 401 defines an "event BAR" as follows:

> This means a Baseline Analysis and Review (BAR) of an event, which involves a fundamental and substantial examination of all surrounding facts and elements of the event, with a focus on constructive criticism and correction of any/all related systems and processes.

resident. Resident B was observed by CVTC staff running from Resident B's room covered in blood. One staff member went to Resident B's room where she found multiple pieces of human ear tissue and a large amount of blood on the floor.

20. On or about May 24, 2007, VOPA opened a formal investigation into the incident to determine whether or not the injuries sustained by Resident B were a result of abuse or neglect.

21. On June 8, 2007, VOPA requested, in writing, records regarding the injuries to Resident B including any risk management review or baseline analysis review conducted regarding the incident.

22. On July 12, 2007, VOPA renewed its request, in writing, for the baseline analysis review and risk management review.

23. Defendants have refused to provide records related to Resident B's injuries requested by VOPA.

24. As a result of the denial of the requested records, VOPA is unable to complete its statutorily authorized investigation into the incident which caused Resident B's injuries.

25. On, or about March 22, 2007, an individual with mental illness hereinafter referred to as "Resident C" died while a patient at CSH. Resident C had been held in some form of restraints for a period of approximately 33 hours before being released. About thirty minutes after Resident C was released from restraints, several CSH staff entered Resident C's bedroom to attempt to place Resident C into restraints. During the restraint

incident, Resident C complained of being unable to breathe. Attempts to revive Resident C failed and Resident C was transported to a community hospital and was pronounced dead.

26. On, or about April 5, 2007 after receiving the report of the death of Resident C while in the custody of [DMHMRSAS], VOPA initiated an investigation of the death to determine whether or not the death was a result of abuse or neglect.

27. On, May 31, 2007, VOPA requested in writing records relating to the death of Resident C, including the root cause analysis, mortality review, and risk management analysis.

28. On or about August 13, 2007, counsel for Defendants informed VOPA that its requests for records was denied by the Commissioner, DMHMRSAS, on the basis of the peer review privilege.

29. On August 29, 2007, VOPA renewed its request, in writing, for the mortality review, root cause analysis, and risk management review regarding Resident C.

30. Defendants have failed to provide records related to Resident C's death requested by VOPA.

31. As a result of the denial of the requested records, VOPA is unable to complete its statutorily authorized investigation into Resident C's death.

32. By letter dated September 14, 2007, VOPA sought to determine whether further discussion of the issue with Defendants would be productive.

33. On or about September 19, 2007, counsel for Defendants requested additional time to consider the issue.

34. By letter dated November 27, 2007, counsel for Defendants informed VOPA that materials created and maintained by DMHMRSAS as peer review would not be provided in response to VOPA's requests for records.

35. The failure of DMHMRSAS to provide the requested records prevents VOPA from obtaining information that it is entitled to receive under federal law, and unlawfully restricts VOPA's ability to conduct statutorily authorized investigations.

CAUSE OF ACTION
DEVELOPMENTAL DISABILITIES ASSISTANCE AND BILL OF RIGHTS ACT AND THE PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS ACT

36. Plaintiffs repeat, reiterate and reallege all of the foregoing, as if fully set forth hereat.

37. At all times alleged, VOPA has been operating under authority granted by the DD Act, 42 U.S.C. § 15001, *et seq.*, and its implementing regulations, 45 C.F.R. § 1386, *et seq.* and the PAIMI Act, 42 U.S.C. § 10801, *et seq.*, and its implementing regulations, 42 CFR § 51.1, *et seq.* as Virginia's protection and advocacy system.

38. The DD Act at 42 U.S.C. § 15043(a)(2)(B) authorizes VOPA as the protection and advocacy system for Virginia to investigate incidents of

abuse and neglect of individuals with developmental disabilities whenever those incidents are reported to VOPA or when VOPA has probable cause to believe that incidents of abuse or neglect have occurred.

39. 42 U.S.C. § 15043(a)(2)(I)-(J) authorizes VOPA to have access to "all records" of any individual who is a client and who has authorized access to records or when there is "probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy" or in the case of the death of an individual with a developmental disability.

40. 45 C.F.R. § 1386.22(b) specifies that VOPA is authorized to have access to records prepared by an agency charged with investigating incidents of abuse or neglect, injury, or death at a facility when such records describe any or all of the following: abuse, neglect, injury, or death; steps taken to investigate the incidents; reports and records, including personnel records prepared or maintained by the facility in connection with such reports of incidents; or supporting information relied upon in creating a report including records describing persons who were interviewed, physical or documentary evidence reviewed and related investigative findings.

41. VOPA's request for records or investigational information pertaining to Residents A and B, including any peer review records, falls within the description of records and investigational information contained in 42 U.S.C. § 15043(a)(2)(I)-(J) and 45 C.F.R. § 1386.22(a)-(b).

42. By refusing to provide the access requested by VOPA, Defendants have violated the DD Act and the regulations promulgated pursuant to it.

43. The PAIMI Act authorizes VOPA as the protection and advocacy system for Virginia to investigate incidents of abuse and neglect of individuals with mental illness whenever those incidents are reported to VOPA or when VOPA has probable cause to believe that incidents of abuse or neglect have occurred. 42 U.S.C. § 10805(a)(1)(a).

44. The PAIMI Act authorizes VOPA to have access to the records of any individual who is a client and who has authorized access to their records. 42 U.S.C. § 10805(a)(4)(A).

45. The PAIMI Act authorizes VOPA to have access to records of any individual who has died or who may be unable to authorize access due to a physical or mental condition, and VOPA has probable cause to believe the individual has been the subject of abuse or neglect. 42 U.S.C. § 10805(a)(4)(B).

46. The PAIMI Act defines records to include reports prepared by staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect and injury occurring at such a facility that describe incidents of abuse, neglect, and injury occurring at such a facility and the steps taken to investigate such incidents. 42 U.S.C. § 10806(b)(3)(A).

47. 42 C.F.R. § 51.41 specifies that VOPA is authorized to have access to records prepared by an agency charged with investigating incidents of abuse or neglect, injury, or death at a facility when such records describe any or all of the following: abuse, neglect, injury, or death; steps taken to investigate the incidents; reports and records, including personnel records prepared or maintained by the facility in connection with such reports of incidents; or supporting information relied upon in creating a report including records describing persons who were interviewed, physical or documentary evidence reviewed and related investigative findings.

48. 42 U.S.C. § 10806(b)(2)(C) provides that: "If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before – (i) the date such system is no longer subject to such a prohibition; or (ii) the expiration of the 2-year period beginning on May 23, 1986, whichever occurs first."

49. VOPA's request for records or investigational information pertaining to Resident C, including any peer review records, falls within the description of records and investigational information contained in 42 U.S.C. §§ 10805-10806 and 42 C.F.R. § 51.41.

50. By refusing to provide the access requested by VOPA, Defendants have violated the PAIMI Act and the regulations promulgated pursuant to it.

51. Due to Defendants' violation of the DD and PAIMI Acts, VOPA is irreparably harmed as it is prevented from carrying out its responsibilities under those Acts.

52. Unless Defendants are enjoined to provide to VOPA the access required by the DD and PAIMI Acts, VOPA will continue to be irreparably harmed and will be unable to protect and advocate for persons with disabilities.

INJUNCTIVE RELIEF

53. Plaintiffs repeat, reiterate and reallege all of the foregoing, as if fully set forth hereat.

54. As a proximate result of Defendants' violation of the DD and PAIMI Acts, VOPA has suffered, and will continue to suffer, irreparable harm for which there is no remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, The Commonwealth of Virginia, Virginia Office for Protection and Advocacy, respectfully prays that this Court grant it the following relief:

A. Enter a declaratory judgment that Defendants' refusal to provide the records requested by VOPA is in violation of the DD and PAIMI Acts.

B. Both preliminarily and permanently enjoin Defendants to provide to VOPA the access to records mandated by the DD and PAIMI Acts.

C. Both preliminarily and permanently enjoin Defendants from interfering, in any way, with VOPA's access to records.

D. Grant VOPA such other and further relief which to this Court seems just and proper.

DATED: 12/3/2007

Respectfully submitted,

/s/ Paul J. Buckley

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. **JAMES S. REINHARD,** in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, **DENISE D. MICHELETTI,** in her official capacity as Director, Central Virginia Training Center, and **CHARLES M. DAVIS,** in his official capacity as Director, Central State Hospital, Defendants.	**Case No. 3:07CV734 (REP)**

ANSWER AND AFFIRMATIVE DEFENSES

Virginia Attorney General Robert F. McDonnell, on behalf of James S. Reinhard, in his official capacity as the Commissioner of the Virginia Department of Department of Mental Health, Mental Retardation, and Substance Abuse Services, Denise Micheletti, in her official capacity as the Director of Central Virginia Training Center, and Charles Davis, in his official capacity as Director of Central State Hospital, (collectively "Virginia Officials"), submits this Answer and Affirmative Defenses to the Plaintiff's Complaint and states as follows:

1. The Virginia Officials admit that Plaintiff is bringing this action against Virginia Officials in their official capacities but deny the remaining allegations contained in Paragraph 1 of the Complaint.

2. Paragraph 2 of the Complaint contains a conclusion of law to which no response is required.

3. Paragraph 3 of the Complaint contains conclusions of law to which no response is required, but to the extent an answer is required, they are denied.

4. The Virginia Officials admit that Plaintiff has made requests for records but denies the allegation in Paragraph 4 of the Complaint that Plaintiff has authority to access the requested records.

5. The Virginia Officials admit the allegation contained in Paragraph 5 of the Complaint.

6. The allegations contained in Paragraph 6 of the Complaint contain statements as to the relief requested by the Plaintiff and conclusions of law to which no response is required. To the extent an answer is required, the Virginia Officials deny the allegations contained in Paragraph 6.

7. The allegations contained in Paragraph 7 of the Complaint contain conclusions of law to which no response is required.

8. The Virginia Officials admit the allegations contained in Paragraph 8 of the Complaint.

9. Paragraph 9 of the Complaint contains conclusions of law to which no response is required.

10. The Virginia Officials admit the allegations contained in Paragraph 10 of the Complaint.

11. The Virginia Officials admit the allegations contained in Paragraph 11 of the Complaint.

12. The Virginia Officials admit the allegations contained in Paragraph 12 of the Complaint.

13. The Virginia Officials admit the allegations contained in Paragraph 13 of the Complaint.

14. The Virginia Officials are without sufficient information to admit or deny the allegations contained in Paragraph 14 of the Complaint and therefore, deny them.

15. The Virginia Officials admit the allegation contained in Paragraph 15 of the Complaint.

16. The Virginia Officials admit the allegation contained in Paragraph 16 of the Complaint.

17. The Virginia Officials admit the allegation contained in Paragraph 17 of the Complaint.

18. The Virginia Officials admit that the baseline analysis review and the risk management review regarding the incident involving Resident A have not been provided to VOPA. The Virginia Officials deny the remainder of the allegations contained in Paragraph 18 of the Complaint.

19. The Virginia Officials admit the allegations contained in Paragraph 19 of the Complaint.

20. The Virginia Officials are without sufficient information to admit or deny the allegation contained in Paragraph 20 of the Complaint and therefore, deny it.

21. The Virginia Officials admit the allegation contained in Paragraph 21 of the Complaint.

22. The Virginia Officials admit the allegation contained in Paragraph 22 of the Complaint.

23. The Virginia Officials admit that the risk management review regarding the incident involving Resident B has not been provided to VOPA. The Virginia Officials deny the remainder of the allegation contained in Paragraph 23 of the Complaint.

24. The Virginia Officials deny the allegation contained in Paragraph 24 of the Complaint.

25. The Virginia Officials admit the allegations contained in Paragraph 25 of the Complaint.

26. The Virginia Officials are without sufficient information to admit or deny the allegation contained in Paragraph 26 of the Complaint and therefore, deny it.

27. The Virginia Officials admit the allegation contained in Paragraph 27 of the Complaint.

28. The Virginia Officials admit the allegation contained in Paragraph 28 of the Complaint.

29. The Virginia Officials admit the allegation contained in Paragraph 29 of the Complaint.

30. The Virginia Officials admit that the root cause analysis and the mortality review regarding the incident involving Resident C have not been provided to VOPA. The Virginia Officials deny the remainder of the allegation contained in Paragraph 30 of the Complaint.

31. The Virginia Officials deny the allegation contained in Paragraph 31 of the Complaint.

32. The Virginia Officials admit receiving a letter from the Plaintiff dated September 14, 2007 but deny the remaining allegations contained in Paragraph 32 of the Complaint.

33. The Virginia Officials admit the allegation contained in Paragraph 33 of the Complaint.

34. The Virginia Officials admit that their counsel sent a letter to Plaintiff dated November 27,

2007 but deny the remaining allegations contained in Paragraph 34 of the Complaint.

35. The Virginia Officials deny the allegations contained in Paragraph 35 of the Complaint.

36. The allegations contained in Paragraph 36 of the Complaint repeat, reiterate, and reallege everything previously stated to which the Virginia Officials incorporate herein their answers to Paragraphs 1-35.

37. The Virginia Officials deny the allegations contained in Paragraph 37 of the Complaint.

38. The allegations contained in Paragraph 38 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

39. The allegations contained in Paragraph 39 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

40. The allegations contained in Paragraph 40 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

41. The allegations contained in Paragraph 41 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

42. The Virginia Officials deny the allegation contained in paragraph 42 of the Complaint.

43. The allegations contained in Paragraph 43 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

44. The allegations contained in Paragraph 44 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

45. The allegations contained in Paragraph 45 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

46. The allegations contained in Paragraph 46 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

47. The allegations contained in Paragraph 47 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

48. The allegations contained in Paragraph 48 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

49. The allegations contained in Paragraph 49 of the Complaint contain conclusions of law to which no response is required but to the extent an answer is required, the allegations are denied.

50. The Virginia Officials deny the allegation contained in paragraph 50 of the Complaint.

51. The Virginia Officials deny the allegation contained in Paragraph 51 of the Complaint.

52. The Virginia Officials deny the allegation contained in Paragraph 52 of the Complaint.

53. The allegations contained in Paragraph 53 of the Complaint repeat, reiterate, and reallege everything previously stated to which the Virginia Officials incorporate herein their answers to Paragraphs 1-52.

54. The Virginia Officials deny the allegations contained in paragraph 54 of the Complaint.

55. The Complaint contains a Prayer for Relief to which no response is required, but to the extent that an answer is required, the Virginia Officials deny any allegations contained in the Prayer for Relief.

56. The Virginia Officials deny all allegations not specifically admitted herein and demand strict proof thereof.

57. The Virginia Officials deny that Plaintiff is entitled to any relief whatsoever.

58. The Virginia Officials deny that they have violated any federal laws or regulations.

59. The Plaintiff is not entitled to the information requested under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10851.

60. The Plaintiff is not entitled to the information requested under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15001-15045.

61. The Plaintiff is not entitled to the information requested under 42 C.F.R. § 51.41 or 45 C.F.R. § 1386.22.

62. The Plaintiff's Complaint fails to state a claim upon which relief can be granted.

63. The Plaintiff's Complaint is barred by sovereign immunity.

64. Under the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), this Court should abstain from exercising jurisdiction.

WHEREFORE, the Virginia Officials request that this Complaint be dismissed, and that they recover their costs.

Respectfully submitted,

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in his official capacity as
Commissioner, Department
of Mental Health, Mental
Retardation and Substance
Abuse Services, of the
Commonwealth of Virginia,

DENISE D. MICHELETTI,
in her official capacity as
Director, Central Virginia
Training Center, and

CHARLES M. DAVIS,
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Plaintiff,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, *et al.*,

Defendants.

Civil Action No. 3:07cv734

ORDER

Having conferred with counsel for the parties by telephone and it appearing that the validity of a federal regulation (45 C.F.R. § 1386.22(c)(1) is in issue and it appearing that the decision on that issue would be better informed if the United States is an [sic] afforded an opportunity to comment upon the validity of the regulation (which is alleged to be in conflict with the requirements of the statute which the regulation is supposed to implement), it is hereby ORDERED that the United States shall be afforded an opportunity to file a brief *amicus curiae* or to

intervene, if, and as, the United States shall be so advised, serving copies upon the parties. In that respect, it is hereby ORDERED that, by March 6, 2008, the United States shall file a statement of its intention to either intervene or to file a brief *amicus curiae*; and it is further ORDERED that, if the United States determines to file a brief or to intervene, it shall file a brief addressing the defendants' motion to dismiss, insofar as it shall implicate the interest of the United States, by April 14, 2008.

It is further ORDERED that, by April 29, 2008, the defendants shall file any response to the position taken by the United States and that, by May 14, 2008, the plaintiff shall file its response to the position taken by the United States and the defendants.

The Clerk is directed to send a copy of this Order to all counsel of record and to Debra Prillaman, Esquire, Assistant United States Attorney, who shall assure that a copy of this Order is delivered to the appropriate representative of the agency involved and the Department of Justice.

It is so ORDERED.

/s/ *REP*

Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: February 15, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. JAMES S. REINHARD, in his official Capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his Official capacity as Director, Central State Hospital, Defendants.	:	Civil Action No. 3:07cv734

ORDER FOR PRESERVATION OF RECORDS

During the pendency of this litigation, and for 60 days after entry of a final order closing the case, the defendants and their respective officers, agents, employees and attorneys, and all persons in active concert or participation with them who receive actual

notice of this order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying, or permitting the destruction of any risk management review, baseline analysis review, mortality review, or root cause analysis that may have been completed by the Defendants after the incidents involving Residents A, B and C as set forth in the Complaint in the actual or constructive care, custody or control of such person, wherever such document is physically located.

It is so ORDERED.

/s/ *REP*

Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: February 15, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation, and Substance Abuse Services, of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:07cv734

UNITED STATES' RESPONSE TO ORDER OF FEBRUARY 15, 2008

The United States is in receipt of the Court's Order of February 15, 2008, ordering that the United States file a statement of intention to intervene or file a brief as amicus curiae in this case. The United States respectfully advises the Court that the U.S. Department of Justice has been promptly notified of the matter and the Court's Order. The status of the United States' consideration of the matter is as follows:

The Department of Justice has assigned an attorney to the matter to solicit the views of the U.S. Department of Health and Human Services (HHS) and to shepherd the matter through the multi-level approval process should that agency recommend to the Department of Justice that a statement of interest should be filed in this case. Undersigned counsel is informed by DOJ that HHS and DOJ will move as expeditiously as possible to review the nature of the challenge at issue and to determine whether to file a statement of interest. If HHS recommends to DOJ that a statement should be filed, it will require approval up to the level of the Assistant Attorney General of the Civil Division of the Department of Justice. The review process within DOJ has not yet begun because the views of the responsible agency, HHS, are not yet known.

The United States is appreciative of the Court's notice concerning the issue presented in this case and does not wish to interfere with the proceedings in this

case, but it is unable to report its intentions at this time.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation, and Substance Abuse Services, of the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:07cv734

NOTICE BY THE UNITED STATES OF ITS NON-PARTICIPATION IN THIS ACTION

In its February 15, 2008 Order, this Court notified the United States that it appeared "that the validity of a federal regulation[,] 45 C.F.R. § 1386.22(c)(1) is in issue," and "afforded an opportunity" for the United States "to comment upon the validity of the regulation." The United States is appreciative of the Court's notice concerning the presentation of this issue in this case.

Upon full consideration of the Court's invitation, including an examination of the facts and legal issues in this action as well as the views of the promulgating agency, the United States has concluded it does not need to become involved at this time. Should involvement of the United States become appropriate, the United States reserves the right to attend to its interests pursuant to 28 U.S.C. § 517 and all other provisions of law.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Plaintiff,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia,

DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center,

and

CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital,

Defendants.

Case No. 3:07CV734 (REP)

DEFENDANTS' STATUS REPORT

Virginia Attorney General Robert F. McDonnell, on behalf of James S. Reinhard, in his official capacity as the Commissioner of the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services ("Department"), Denise Micheletti, in her official capacity as the Director of Central Virginia Training Center, and Charles Davis, in his official capacity as Director of Central State Hospital (collectively "Virginia Officials"), submits this Status Report.

At the conclusion of the Hearing on June 27, 2008, all parties informed the Court that they would attempt to work out an arrangement that would allow VOPA to access the requested documents while addressing the Virginia Officials' concerns. Those efforts have failed.

As the Virginia Officials represented during the hearing, they are willing to provide the documents to VOPA if VOPA agrees in writing not to use the information in litigation against the Department or to redisclose the information to third parties. Although this proposal would allow VOPA to conduct its investigation and would alleviate any concerns about the Virginia Officials' compliance with federal law, this proposal is unacceptable to VOPA.

In light of VOPA's rejection of the Virginia Officials' offer, this Court has no choice but to rule on the Virginia Officials' Motion to Dismiss.

However, if this Court grants the Motion to Dismiss on sovereign immunity or abstention grounds and if VOPA files a new lawsuit in the Circuit Court for the City of Richmond, then the Virginia Officials will enter into a consent decree that:

> (1) requires the Virginia Officials to disclose the requested documents; and
>
> (2) forbids VOPA from using the information in litigation against the Department and from redisclosing the information to third parties.

Although the Virginia Officials are willing to enter such a consent decree in the state courts, they are unwilling to enter into such an agreement in this Court. Quite simply, federal courts should not referee "an intramural contest" between "a state's warring factions." *Virginia Office for Protection & Advocacy v. Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring). In our constitutional system of dual sovereignty, federal courts lack "the power to Balkanize state government." *Id.* If the Virginia Officials are going to be subjected to a voluntary consent decree or to an involuntary judicial order, it should be from a state court.

Accordingly, the Virginia Officials ask that this Court grant their Motion to Dismiss.

Respectfully submitted,

JAMES S. REINHARD,
in his official capacity as
Commissioner Department
of Mental Health, Mental
Retardation and Substance
Abuse Services, of the
Commonwealth of Virginia,

DENISE D. MICHELETTI,
in her official capacity as
Director, Central Virginia
Training Center, and

CHARLES M. DAVIS,
in his Official Capacity as
Director, Central State Hospital,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, Plaintiff, v. **JAMES S. REINHARD,** in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, **DENISE D. MICHELETTI,** in her official capacity as Director, Central Virginia Training Center, and **CHARLES M. DAVIS,** in his official capacity as Director, Central State Hospital, Defendants.	**Case No. 3:07CV734 (REP)**

NOTICE OF APPEAL

The Defendants, James S. Reinhard, in his official capacity as the Commissioner of the Virginia Department of Department of Mental Health, Mental Retardation, and Substance Abuse Services, Denise Micheletti, in her official capacity as the Director of Central Virginia Training Center, and Charles Davis, in his official capacity as Director of Central State Hospital (collectively "Virginia Officials"), through their counsel and appeal this Court's July 18, 2008 Memorandum Opinion and Order, denying sovereign immunity to the Virginia Officials.

A denial of sovereign immunity is a final order under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Authority v. Metcalfe & Eddy, Inc.*, 539 U.S. 139, 147 (1993).

JAMES S. REINHARD,
in his official capacity as
Commissioner Department
of Mental Health, Mental
Retardation and Substance
Abuse Services, of the
Commonwealth of Virginia,

DENISE D. MICHELETTI,
in her official capacity as
Director, Central Virginia
Training Center, and

CHARLES M. DAVIS,
in his official capacity as
Director, Central State Hospital

/s/ William E. Thro

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA, VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY

v. Civil No. 3:07cv734

JAMES S. REINHARD, ET AL.

ORDER

For the reasons set forth on the record during the conference call on September 3, 2008, and with agreement of all parties, it is hereby ORDERED that Defendants' Motion to Stay All Proceedings pending the resolution of the interlocutory appeal currently before the United States Court of Appeals for the Fourth Circuit is granted.

It is also hereby ORDERED that Plaintiff's Motion for Summary Judgment is withdrawn without prejudice pending the resolution of the above-mentioned interlocutory appeal.

It is so ORDERED.

/s/ *REP*
Senior United States District Judge

Richmond, Virginia
Date: September 8th, 2008

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 24 2010
OFFICE OF THE CLERK

No. 09-529

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER,

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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AUGUST 24, 2010

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 568 F.3d 110. The decision of the district court (Pet. App. 30a-46a) is unreported.

JURISDICTION

The court of appeals issued its opinion on June 2, 2009. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on July 30, 2009. Pet. App. 47a-48a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The relevant portions of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.*, and the relevant Virginia statutes are set forth at Pet. App. 49a-81a.

STATEMENT OF THE CASE

A. Statutory Framework

1. Federal Statutes. Both the Developmental Disabilities Assistance and Bill of Rights Act (Developmental Disabilities Act), Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 *et seq.*), and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 *et seq.*), were enacted in response to extensive abuse at state-run institutions for persons with mental disabilities and mental illnesses.

a. Congress enacted the Developmental Disabilities Act after learning during extensive hearings "that totally unacceptable conditions still prevail in many public and other facilities for the developmentally disabled." S. Rep. No. 94-160, at 28 (1975).

For example, Willowbrook State School, a New York state institution for persons with mental retardation, received significant national attention due to its substandard treatment of persons with developmental disabilities. Before enactment of the Developmental Disabilities Act, then-investigative reporter Geraldo Rivera uncovered extensive, graphic abuse of the developmentally disabled at Willowbrook. Rivera testified before Congress as to the obvious signs of abuse he found at the state-run institution:

> [W]hen you walk into a room that is about half the size of this one that has 200 children

> in it and those children are smeared with their own f[e]ces and they are naked and dressed in rags and knocking their heads against the wall and there are only three or four attendants to take care of these kids, I don't have to be a specialist to know there is something wrong there.

S. Rep. No. 94-160, at 29.

Rivera's testimony was confirmed by the findings of a federal investigation conducted at the request of the Senate. Federal investigators from the Department of Health, Education, and Welfare visited Willowbrook and found the state institution replete with "substandard and inadequate" care that ignored the "basic health and hygiene needs of the residents." *Id.* at 30.

Other state-run institutions subjected residents to similarly abhorrent conditions. At Alabama's Partlow State School and Hospital, reports revealed numerous abuses, including that 54 young resident boys were provided "[g]round food" and fed with "nine metal plates and nine metal spoons" served by "[n]ine working residents" in a manner that made it impossible to determine "which residents had been fed and which had not been fed." *Id.* at 30.

The problems in state-run facilities were difficult for States to resolve themselves. Congress found that "there is an inherent conflict in the role a State must play in delivering services and administering programs for persons with developmental disabilities

and in protecting the human and legal rights of such persons." *Id.* at 37.[1] And Congress also found that because the institutions are often "far removed" from urban areas and cut off from mainstream society, it was difficult to detect abuse and neglect. *Id.* at 28.[2]

Through the Developmental Disabilities Act, Congress sought to address these problems with a two-pronged approach. First, it offered States federal funds to develop plans to improve medical care, vocational training, and other social services for persons with developmental disabilities. 42 U.S.C. §§ 15023(a), 15024.

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[1] *See Developmental Disabilities Act Extension and Rights of Mentally Retarded: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Public Welfare*, 93d Cong. 536 (1973) (statement of United Cerebral Palsy Ass'ns) ("1973 S. Hrg.") ("The track record of states policing their own operations has not been good. Indeed many states do not even require their state operated facilities to meet their own state licensure requirements."); *id.* at 565 (statement of Federation of Parents' Organizations for New York State Mental Institutions) ("You have left the job in prior years to the States. They have shown for the most part that they cannot and will not do what is necessary without Federal assistance and Federal supervision."); *id.* at 645 (statement of Accreditation Council for Facilities for the Mentally Retarded) ("State-conducted surveys of State-operated facilities" represent "a conflict of interest").

[2] *See* 1973 S. Hrg. at 586 (statement of National Advisory Council on Developmental Disabilities) (individuals were "isolated from the community"); *id.* at 677 (statement of National Association of Coordinators of State Programs for the Mentally Retarded) (same).

Second, as a condition on receipt of those funds, a State also had to designate an independent entity as a Protection and Advocacy System to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such [developmentally disabled] individuals within the State who are or who may be eligible for treatment, services, or habilitation." 42 U.S.C. § 15043(a)(2)(A)(i).

In encouraging States to designate entities as Protection and Advocacy Systems, Congress stressed the importance of the System's independence so that "a developmentally disabled individual within the delivery system has a means to reach outside the established delivery system for examination of situations in which his rights as an individual citizen may be being violated." S. Rep. No. 94-160, at 38.

Seven years later, after hearings to study the activities of the Protection and Advocacy Systems on behalf of persons with developmental disabilities,[3] Congress described the Systems as being "of critical importance in an expanding effort by the Congress to assure disabled persons both protection of their rights under law and full access to federally funded

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[3] *Oversight of Developmental Disabilities Assistance and Bill of Rights Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 98th Cong. (1984); *Bill of Rights Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 97th Cong. (1981).

programs." S. Rep. No. 98-493, at 28 (1984). At that time, Congress amended the Developmental Disabilities Act to provide additional protection to the System's independence.

For example, Congress prohibited States from withdrawing an entity's designation as a Protection and Advocacy System absent "good cause." Pub. L. No. 98-527, § 142(5), 98 Stat. 2662, 2680 (1984). In so doing, Congress explained that "litigation against any agency of state or local government" would not be good cause; it would be the sign of a working System. S. Rep. No. 98-493, at 29. Although Congress "commend[ed] the emphasis by P&A's on mediation and/or administrative remedies," it recognized "that there will undoubtedly be future instances where litigation is the necessary alternative to protect disabled persons' rights." *Id.* at 28.

b. Congress enacted the PAIMI Act in 1986 to expand the reach of Protection and Advocacy Systems to include protection of individuals with mental illness, in addition to people with disabilities.

In the 1980s, the Senate conducted hearings on the treatment of institutionalized persons who are developmentally disabled, mentally retarded, and mentally ill. *See Care of Institutionalized Mentally Disabled Persons: Joint Hearings before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources and the Subcomm. on Labor, Health and Human Servs., Educ. and Related Agencies of the S. Comm. on Appropriations*, 99th Cong.

(1985) ("1985 S. Hrg."). These hearings, along with a 246-page report by Senate staff on the conditions in state-run facilities, led to passage of the PAIMI Act. S. Rep. No. 99-109, at 1 (1985). Violence, neglect, and inhumane conditions were found in state-run institutions throughout the Nation. 1985 S. Hrg., at 704-709 (Staff Report on the Institutionalized Mentally Disabled).

As Senate investigators and hearing testimony demonstrated, States were completely failing to monitor, investigate, and ultimately address this abuse. *See id.* at 774 ("While all of the institutions Senate staff visited had documented policies for reporting complaints and abuse, implementation of these policies was often impractical and ineffective."). In addition, most Protection and Advocacy Systems did not provide such assistance to the mentally ill. *Id.* at 777 ("Although the Developmental Disabilities Act does not specifically prohibit state P&A's from providing services for the mentally ill, very few are served."). These findings were based, in part, on a Senate staff investigation. That investigation revealed that state-run facilities were monitored and inspected by "only a handful of state-paid monitors" whose reports were "largely denied public airing," leaving the residents unprotected and allowing employees of these institutions to "live and work in virtual secrecy." *Id.* at 699; *see also id.* at 700-701 (finding that some state-run "facilities have no apparent internal standards, as several wards may appear barren and in disrepair with the smell of

urine and cigarette smoke in the air and patients sleeping on bathroom floors").

In enacting the PAIMI Act, Congress expressly determined that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing "State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a)(1), (4).

Congress thus made clear that it intended the federal funds to assist States in establishing Protection and Advocacy Systems that could engage in "activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.* § 10801(b)(2)(A).

2. Although Congress intended that a Protection and Advocacy System be independent of the State, Congress gave States flexibility as to how to achieve that goal. Under both statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that the Systems "shall * * * be independent of" any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2).

While a State is free to establish a Protection and Advocacy System either as a "private nonprofit entity" or as a state entity, *id.* §§ 15044(a), 10805(c)(1)(B), in either situation, the Governor may

appoint no more than one-third of any governing board of a System. *Id.* § 15044(a)(2).

Every State accepts federal funds under the Developmental Disabilities Act and each State has designated a Protection and Advocacy System under the Developmental Disabilities Act and the PAIMI Act.

Initially, sixteen States designated a state entity as their Protection and Advocacy System. *See* Commission on the Mentally Disabled, American Bar Ass'n, *Developmental Disabilities Protection & Advocacy: A Review of the State Plans* at App. A-1 (1978). Today, only Virginia and seven other States continue to designate independent state agencies,[4] while the remaining forty-two States have opted for not-for-profit corporations.

Once a State establishes a System as either a private non-profit or a state entity, it cannot (as of 1984) change the nature of the System from private to public (or vice versa) absent "good cause." *Id.* § 15043(a)(4)(A). And any such change can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v.*

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[4] *See* Conn. Gen. Stat. § 46a-7 *et seq.*; Ind. Code § 12-28-1-1 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq.* Alabama's system is established by unpublished Governor's directive.

Department of Health & Human Servs., 997 F.2d 1290, 1292 (9th Cir. 1993).

Congress provided additional federal protections for, and federal oversight of, Protection and Advocacy Systems. States are prohibited from imposing "hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system." 42 U.S.C. § 15043(a)(2)(K). Protection and Advocacy Systems are subject to federal onsite review, *id.* § 15044(d), and are required to submit annual reports to the federal government, *id.* §§ 10805(a)(7), 15044(e).

3. Both the Developmental Disabilities Act and the PAIMI Act anticipate a separate protection role for the Protection and Advocacy System, regardless of whether it is a state or a not-for-profit entity. Both Acts expressly provide that a Protection and Advocacy System "shall * * * have access" to patient records and treatment facilities, *id.* §§ 15043(a)(2)(I), (c), 10805(a)(3), (4), and shall have authority to pursue "administrative, legal, and other appropriate remedies" to ensure the protection of individuals with disabilities or mental illness who are receiving care or treatment in the State, *id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B).

This federal right to access to records is not contingent on state law. To the contrary, the System

is entitled to records even if "the laws of a State prohibit [the System] from obtaining access to the records." *Id.* § 10806(b)(2)(C) (PAIMI); Pub. L. No. 101-496, § 15, 104 Stat. 1191, 1200 (1990) (Developmental Disabilities Act); *see also* 42 U.S.C. § 10806(a) (providing that the System may disclose certain information required to be maintained as confidential under state law to the person who is the subject of the information). In enacting this requirement, Congress recognized that access to such records was necessary "to ensure the protection of mentally ill persons." S. Rep. No. 99-109, at 10 (1985).

*2. **Virginia Law.*** The current independence of petitioner VOPA, Virginia's designated Protection and Advocacy System, in terms of litigating authority and otherwise, is the result of more than 30 years of deliberate decisions by Virginia's political branches.

a. Petitioner's original predecessor (the Virginia Developmental Disabilities Protection and Advocacy System) was created in August 1977 by executive order. *See* Va. Exec. Order No. 55 (Aug. 15, 1977), http://tinyurl.com/1977-08-15-Va-EO55. It was then an "Office" within the Office of the Secretary of Human Resources. The Secretary appointed the Director of the advocacy Office. That advocacy Office had the "authority to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of" people with developmental disabilities. *Id.* at 1. And it was directed to "[p]rovide access for persons who are developmentally disabled

to appropriate administrative or legal remediation of their needs." *Ibid.*

Four months later, the Governor rescinded that executive order. *See* Va. Exec. Order No. 60 (Dec. 20, 1977), http://tinyurl.com/1977-12-20-Va-EO60. The Governor replaced the order with one that removed the advocacy Office's authority to pursue legal remedies. Instead, the Office was required to advise the Secretary of Human Resources "immediately when it has been determined by the Office that the rights of any developmentally disabled person[s] residing within a State facility are being, or have been abridged or otherwise interfered with." *Id.* at 1. The Office could "thereupon" take "appropriate action" in any administrative forum, but if those actions were unsuccessful, it was to "refer the matter to an attorney not employed by the Commonwealth for further appropriate action." *Ibid.*

b. In 1981, a subsequent Governor withdrew Virginia from the Developmental Disabilities Act. *See* Library of Virginia Abstract, *Developmental Disabilities Planning Council of Virginia: Agency History* (1999), http://tinyurl.com/1999-Agency-History-Abstract; *see also* Glenn Frankel, *Dalton Withdraws Virginia from U.S. Mental Program*, WASH. POST, Dec. 5, 1980, at B1; 47 Fed. Reg. 36,968 (Aug. 24, 1982) (realloting federal funds not utilized by Virginia to other States). Thus, at that time, Virginia no longer had an obligation to maintain a Protection and Advocacy System.

The Governor rescinded the prior executive order and created a State Advocacy Office for the Developmentally Disabled. *See* Va. Exec. Order No. 47 (Jan. 9, 1981), http://tinyurl.com/1981-01-09-Va-EO47. The new Office still reported to the Secretary of Human Resources, but the Office's Director was appointed by the Governor. The new Office could "pursue administrative remedies with the appropriate State officials," but if no resolution was reached, the Office was instructed to "recommend alternatives to the Secretary." *Id.* at 1.

c. In 1982, yet another Governor decided that Virginia should again participate in the Developmental Disabilities Act. *See* Library of Virginia Abstract, *supra*; *Robb Asks Virginia's Readmission to Program for Mentally Disabled*, WASH. POST, July 2, 1982, at B7.

The Attorney General recommended that, in rejoining the Developmental Disabilities Act program, the Governor instruct the Office not to initiate litigation against another state agency without the Governor's written approval. Letter from Gerald Baliles, Attorney Gen. of Va., to Charles Robb, Governor of Va., at 2 (June 21, 1982), http://tinyurl.com/1982-06-21-AG-Ltr. The Attorney General explained that "[f]or a brief period of time in the past, the State Advocacy office was free to determine its own legal needs and initiate legal action in the courts against other state agencies; that authority, in theory, included the power to sue the Governor." Letter from Gerald Baliles, Attorney Gen. of Va., to Charles Robb,

Governor of Va., at 1 (May 12, 1982), http://tinyurl.com/1982-05-12-AG-Ltr. That independent litigating authority, the Attorney General believed, was not "warranted." *Ibid.*

The Governor did not issue a new executive order regarding the Office but simply adhered to the 1981 executive order. Although there is a gap in the available records, petitioner understands that the Governor adopted the advice of his Attorney General and required petitioner's predecessor to seek gubernatorial authorization prior to filing litigation.

d. In 1984, because doubts had been raised whether the Governor had the authority to create the Office without legislative approval,[5] the Virginia legislature codified petitioner's predecessor's status. 1984 Va. Acts ch. 580. The statute created the Advocacy Department for the Developmentally Disabled. In substance, the statute tracked the 1981 executive order. The Director of the Department was appointed by the Governor and served at his pleasure. Va. Code Ann. § 37.1-239 (Michie 1987). And the Department could only "[p]ursue administrative remedies with the appropriate state officials and recommend alternatives to the Secretary [of Human Resources] if a

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[5] *See* Virginia Joint Legislative Audit & Review Comm'n, *An Assessment of Structural Targets in the Executive Branch of Virginia*, Va. H. Doc. No. 20, at 23-24, 107 (1984), http://jlarc.state.va.us/reports/Rpt58.pdf.

resolution to the problem is not attained." *Id.* § 37.1-240(3) (Michie 1987).

e. The authority of petitioner's predecessor changed in 1985 as part of the Virginians with Disabilities Act, 1985 Va. Acts ch. 421.

That statute renamed petitioner's predecessor the Department for Rights of the Disabled. Like the heads of its predecessors, the Director of the Department reported to the Secretary of Human Resources and was appointed by Governor, but was subject to confirmation by the General Assembly. Va. Code Ann. § 51.01-36 (Michie 1987).

The statute authorized the Department "to pursue legal, administrative, and other appropriate remedies to protect the rights of persons with disabilities." *Id.* § 51.01-37(5) (Michie 1987). The statute conditioned the filing of an action "in any court," however "upon the express approval of Governor." *Ibid.* Moreover, "[i]n the event there is no conflict of interest nor federal requirement to the contrary," the Governor could "refer such action to the office of the Attorney General." *Ibid.* In addition, the Department could not hire its own counsel absent express approval of the Attorney General. *Id.* § 51.01-37(6) (Michie 1987).

f. In 1991, the United States Department of Health and Human Services ("HHS") determined that the statutory requirement for gubernatorial approval prior to initiation of litigation was inconsistent with the Developmental Disabilities Act requirement of

independence. "If gubernatorial approval must be obtained prior to the pursuit of court action, then the Virginia P&A does not have the required authority to pursue legal remedies as mandated by law." Letter from Deborah McFadden, Comm'r, Dep't of HHS Administration for Children and Families, to James Rothrock, Director, Dep't for Rights of Virginians with Disabilities, at 3 (May 1, 1991), http://tinyurl.com/1991-05-01-HHS-Ltr.

In response, Virginia considered various options, including withdrawing from the Developmental Disabilities Act, designating a not-for-profit corporation its Protection and Advocacy System, or challenging HHS's interpretation of the Act. Memorandum from Susan Ferguson, Assistant Attorney Gen. of Va., to Howard Cullum, Sec'y of Human Resources (May 31, 1991), http://tinyurl.com/1991-05-31-AG-Memo. Virginia recognized that removing gubernatorial approval would leave it open to suits by petitioner's predecessor and would be unpopular with several constituencies who had lobbied to ensure gubernatorial oversight of the System's litigation activity. Memorandum from James Rothrock, Director, Dep't for Rights of Virginians with Disabilities, to Howard Cullum, Sec'y of Human Resources (July 9, 1991), http://tinyurl.com/1991-07-09-DRVD-Memo (discussing opposition of Virginia Municipal League and Virginia Association of Counties).

In the end, Virginia amended the statute to remove the gubernatorial approval and Attorney General representation provisions. 1992 Va. Acts

ch. 627 (codified at Va. Code Ann. § 51.5-37(4) (Michie 1992)).

g. In 2002, Virginia legislatively established petitioner VOPA in its current form as an "independent state agency," Va. Code Ann. § 51.5-39.2(A), with independent litigating authority. The current independence of VOPA is reflected in a number of provisions.

First, VOPA's governing board consists of eleven "nonlegislative citizen members," only three of whom are appointed by the Governor. *Id.* § 51.5-39.2(B). The remaining eight members are appointed by the legislative branch (five by the Speaker of the House of Delegates and three by the Senate Committee on Rules). *Ibid.* VOPA itself nominates board members and, although the appointing authorities are not limited to these nominees, they "shall seriously consider the persons nominated and appoint such persons whenever feasible." *Ibid.* Members of the board serve for fixed terms and may be removed only through a judicial proceeding and only for good cause. *See id.* § 51.5-39.2(F) (incorporating § 24.2-230 *et seq.*).

Second, "[n]otwithstanding any other provision of law," petitioner is "independent of the Office of the Attorney General," which is headed by an elected official. *Id.* § 51.5-39.2(A). VOPA possesses the authority "to employ and contract with legal counsel * * * to initiate actions on behalf of [VOPA] * * * in any matter, including state, federal and

administrative proceedings." *Ibid.* VOPA is virtually unique among Virginia state agencies in its authority to retain its own legal counsel without permission from the Attorney General. *See id.* § 2.2-510.

Third, VOPA's finances are independent. VOPA's Board administers "a special nonreverting fund to be known as the Protection and Advocacy Fund." *Id.* § 51.5-39.5(B). "Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the [State's] general fund but shall remain in the Fund." *Ibid.* VOPA may "apply for and accept, gifts, donations, grants, and bequests * * * from the United States government * * * and from any other source and [may] deposit all moneys received in the Protection and Advocacy Fund." *Ibid.* To these ends, VOPA "shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient or desirable." *Ibid.*

The State, by contrast, may not reduce the funds it dedicates to VOPA based on the presence of federal funds. 42 U.S.C. § 15043(a)(2)(M). In the current biennial budget (June 2010-June 2012), Virginia will provide no funds to VOPA; petitioner's only source of new funds will be the estimated $2.5 million annual grant from the federal government. *See* 2010 Va. Acts ch. 874 at 365-366. In addition, the federal government provides the federal funds "directly" to VOPA. 42 U.S.C. § 15042(b).

And, of particular significance for this case, petitioner VOPA is authorized to "access records of

facilities [and] institutions * * * that provide care or treatment to individuals with disabilities regarding the commitment, care, treatment, and habilitation of such individuals, unless the disclosure of such records is specifically prohibited by federal law." Va. Code Ann. § 51.5-39.4(4). The state law provides, however, that "there shall be no right of access to privileged communications pursuant to § 8.01-581.17," involving certain medical reports generated by peer review committees. *Ibid.* VOPA is further authorized to "initiate any proceedings to secure the rights" of persons with disabilities. *Id.* § 51.5-39.2(A).

These 2002 amendments resulted from years of legislative efforts by advocates for people with disabilities who contended that Virginia's Protection and Advocacy System needed more independence from the executive branch to properly perform its watchdog function. Those efforts were based on persistent complaints that the System was ineffective and unwilling to criticize or sue state agencies. *See* Holly Heyser, *Advocates for Disabled Ask Feds to Stop Funding Agency*, VIRGINIAN-PILOT, July 27, 1999, at A-1; Holly Heyser, *Mental Health Reform Likely to Pass with Changes*, VIRGINIAN-PILOT, Apr. 7, 1999, at A-1; Michael Hardy, *Mental Health Advocates Back Independent Agency*, RICHMOND TIMES DISPATCH, Feb. 26, 2000, at A-10. Indeed, VOPA's predecessor acknowledged that it had "been stymied, historically, in carrying out its duties," even while praising the then-current Governor's administration. Holly Heyser,

Bill Giving Agency for Disabled Independence Clears Committee, VIRGINIAN-PILOT, Feb. 7, 1999, B-5.

When the legislation was enacted in 2002, the Governor at the time explained that the statute "remove[d]" the Protection and Advocacy System from the executive branch "to ensure that these systems are able to function with the required independence and autonomy." Letter from Mark Warner, Governor of Va., to Heidi Lawyer, Acting Director, Dep't for Rights of Virginians with Disabilities, at 1 (July 1, 2002), http://tinyurl.com/2002-07-01-Gov-Ltr.

B. Factual Background

This case arises from petitioner VOPA's attempt to investigate the deaths of two individuals, and injuries to a third, that occurred while the individuals were residents of institutions operated by the Commonwealth of Virginia. The facts discussed below are drawn from VOPA's complaint and its motion for a preliminary injunction.

Resident A. The first of these individuals, "Resident A," was a person with mental illness and retardation. He died while a resident of Central Virginia Training Center (CVTC). Respondent Micheletti runs CVTC under the supervision of respondent Stewart, as Commissioner of the Department of Behavioral Health and Developmental Services. J.A. 12-13.

Resident A had a decades-long history at CVTC of ingesting non-edible items. After exhibiting

symptoms of bowel obstruction, Resident A was transported to a community hospital for surgical removal of two latex gloves from his intestines. Resident A died eight days after the surgery. J.A. 13.

VOPA initiated an investigation to determine whether Resident A's death resulted from abuse or neglect. As part of this investigation, VOPA repeatedly requested copies of certain reviews conducted by CVTC in conjunction with Resident A's death. CVTC acknowledged VOPA's requests, but failed to provide the reviews. J.A. 14.

Resident B. "Resident B," an individual with mental retardation, was assaulted at CVTC by another resident, and was observed by CVTC staff running from Resident B's room covered in blood. A CVTC staff member found multiple pieces of human ear tissue and a large amount of blood on the floor in Resident B's room. J.A. 14-15.

VOPA initiated an investigation to determine whether Resident B's injuries resulted from abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CVTC concerning Resident B's injuries, but CVTC refused to provide them. J.A. 15.

Resident C. The second death was that of an individual with mental illness, "Resident C," who was a patient at Central State Hospital (CSH), which respondent Montgomery runs under the supervision of respondent Stewart. J.A. 15.

Resident C complained of being unable to breathe when CSH staff attempted to place him in restraints. During this restraint incident, efforts to revive Resident C became necessary, but failed. Resident C was transported to a community hospital where he was pronounced dead. J.A. 16.

VOPA initiated an investigation to determine whether the death was the result of abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CSH relating to the death of Resident C, but its requests were rebuffed on grounds of peer review privilege. J.A. 16.

C. Proceedings Below

1. Petitioner VOPA filed this action against respondent state officials in the United States District Court for the Eastern District of Virginia seeking a preliminary and permanent injunction requiring respondents to provide the requested records. J.A. 21. VOPA also sought a declaratory judgment that respondents were violating federal law in refusing to provide the records. J.A. 21.

2. The district court denied respondents' motion to dismiss, which was based on failure to state a claim and Eleventh Amendment immunity. Pet. App. 30a-46a.

The district court held that petitioner had stated a claim because it alleged that respondents refused to provide records that are required to be provided to petitioner under federal law. Pet. App. 34a. The district court held that it was not appropriate to

resolve at that time respondents' argument that a non-preempted state law permitted them to withhold the records. Pet. App. 35a.

The district court also rejected respondents' reliance on the Eleventh Amendment. The court first concluded that respondents had not waived their immunity by accepting federal financial assistance under a statute that clearly contemplated litigation between petitioner and other state agencies. Pet. App. 39a-40a.[6]

But the court held that the action could proceed against respondents under *Ex parte Young*, 209 U.S. 123 (1908). The court concluded that petitioner met the "predicate for the application of *Ex parte Young*," in that it sued "officials in their official capacities," and not the state entities themselves. Pet. App. 40a. Further, the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Pet. App. 41a (quoting *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002)). Petitioner claims that respondents "continue to refuse to provide records" as required by federal law and petitioner sought "an injunction that [respondents] prospectively release the records." Pet. App. 41a-42a.

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[6] The court of appeals affirmed that holding (Pet. App. 10a-13a) and petitioner did not seek further review of it.

The district court rejected the claim that the action presented "special sovereignty interests" that "trump[ed]" *Ex parte Young*. Pet App. 43a. The court held that there was "no decision which supports" respondents' "broad rule" that the Eleventh Amendment requires a federal court to "refrain from deciding any cases brought by a state agency against another state agency." Pet. App. 45a.

Instead, the court reasoned, it is "the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests." Pet. App. 45a. This case does not concern disputes between a State and a political subdivision regarding "internal budgetary arrangements" which, the district court noted, had been an area the federal courts had avoided. Pet. App. 43a. Adjudicating the violation of federal law alleged here "does not interfere with the prerogative of the State." Pet. App. 44a.

3. Respondents filed an interlocutory appeal to challenge solely the denial of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). "Because the denial of a motion to dismiss for failure to state a claim is not a final judgment," respondents did "not appeal that aspect of the judgment." Br. in Opp. 7 n.5. The court of appeals reversed and remanded with instructions to dismiss the action on Eleventh Amendment grounds. Pet. App. 1a-29a.

The court of appeals held that despite its "superficial appeal," *Ex parte Young* was not available

because petitioner was a state agency. Pet. App. 14a. The court of appeals relied on (1) the absence of any historical evidence that such suits previously had been permitted, Pet. App. 14a-16a; (2) "sovereign interests and federalism concerns" as reflected in cases such as *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), *Alden v. Maine*, 527 U.S. 706 (1999), and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), Pet. App. 16a-20a; and (3) Supreme Court cases refusing to give relief to political subdivisions that sued States for alleged constitutional violations, Pet. App. 21a-24a.

4. Petitioner filed a petition for rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 47a-48a.

SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar this action for prospective relief to remedy an ongoing violation of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908), authorizes this suit. The fact that petitioner is a state-created public entity does not change the analysis.

A.

1. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has treated the Eleventh Amendment as reflecting a broad vision of state sovereign immunity rooted in common law traditions and federalism. At the same time, however, this Court has been careful to avoid creating a situation where federal courts lack

authority to curb state violations of federal law in contravention of the Supremacy Clause. Thus, consistent with common law traditions, the Court has distinguished between plaintiffs suing the sovereign in its own name and those suing the sovereign's officials. This Court's decision in *Ex parte Young* encapsulated a century's worth of American jurisprudence.

2. To address the Eleventh Amendment's concern for protection of state treasuries, *Ex parte Young* does not permit retroactive damage awards.

To protect the dignity of the State, *Ex parte Young* suits are further limited. *Ex parte Young* does not permit actions directly against the sovereign in its own name; it permits only suits against individual state officials. And, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, its scope is limited to the enforcement of federal law.

3. Petitioner's suit is a classic *Ex parte Young* action. Indeed, respondents have acknowledged that, if this suit had been brought by an entity chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. Resp. C.A. Opening Br. 26. That should be the end of the case. *Ex parte Young*'s recognition of federal judicial power in suits against state officers to enjoin ongoing violations of federal law strikes the requisite balance between state and

federal interests. Where these conditions are met, no additional "balancing" is required or warranted.

B.

The Fourth Circuit's per se rule – that, because petitioner is a state agency, the Eleventh Amendment does not allow a federal court to adjudicate whether state officials are violating federal law – is unmoored in the purposes underlying the Eleventh Amendment and ignores the contrary historical evidence.

1. This Court has never limited who the plaintiff can be in an *Ex parte Young* suit. Such suits can be brought by individuals, corporations, Indian Tribes, and foreign nations. It would be incongruous to suggest that an *Ex parte Young* suit by an agency of a foreign country or another State accords the States their dignity, while a suit by a state agency that a State has created and given independent litigating authority does not. If anything, because the same sovereign created the parties on both sides of a lawsuit such as this one, it is actually less an affront to the sovereign than when a sovereign is sued by a private party or another sovereign. This is because, ultimately, the sovereign retains the authority to dissolve the state-agency plaintiff if the State believes the litigation (or the resulting relief) is too onerous.

There is nothing anomalous about permitting an entity created by the State to sue the State's officials in federal court under *Ex parte Young*. To the contrary, this happens regularly with regard to private corporations. While petitioner is a part of the state

government, its independence makes it not unlike a private corporation for present purposes. Like a private corporation, Virginia cannot make petitioner compromise its federally-established statutory right to records from respondents or its federally-established statutory duty to protect persons with disabilities and mental illness.

To be sure, a federal law that *unilaterally* vested one component of a State with federal rights against other components of that State might raise Tenth Amendment concerns. But that is not the case here. The federal right to access records that petitioner claims in this case derives from two voluntary choices made by the State. First, Virginia chose to establish a Protection and Advocacy System in order to be eligible to receive certain federal funds under the Developmental Disabilities Act. Second, Virginia elected to constitute petitioner as a public entity, rather than as a not-for-profit corporation. Given these two voluntary decisions, respondents can hardly complain that Virginia has been divided against itself by the federal government.

2. At the time of the Constitution's ratification and the ratification of the Eleventh Amendment, it was already well established in England that courts could entertain suits by governmental entities created by the King against the King's officials or other governmental entities created by the King. These examples show that two governmental parties could seek and obtain a judicial resolution in the King's court of a dispute as to whether the defendant's

conduct was consistent with the supreme law of England. Of course, because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard. But the adjudication of such suits in England demonstrates that these suits are not new phenomena requiring the development of a new set of rules governing sovereign immunity. Rather, these suits were historically-recognized suits that warrant application of historically-established rules, reflected in *Ex parte Young*. Because the dispute here is about federal law, adverse parties representing two state-created governmental entities should be able to obtain resolution of their legal dispute in federal court to govern their actions prospectively.

3. Respondents have cited four cases from this Court that they claim establish that "political subdivisions may not invoke *Ex parte Young* against state officials of the same State." Br. in Opp. 16. But none of those cases involved suits against state officials. In each case, the municipality did not prevail in its challenge to a state law because of the broad authority States have in organizing and reorganizing their subdivisions. Those cases thus shed no light on the question whether a state-created public entity that possesses a federal right against its creator may rely on *Ex parte Young*. More relevant are this Court's cases in which the Court has resolved disputes on the merits between political subdivisions

(or their officials) and state officials brought originally in federal district court.

C.

1. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), held that under the "particular and special circumstances" of that case, *Ex parte Young* was not available. *Id.* at 287. To determine whether the suit was permitted under *Ex parte Young*, the portions of the opinion in *Coeur d'Alene* joined by a majority of Justices focused exclusively on the extraordinary relief sought. Specifically, the plaintiffs in that case sought an injunction to carve out part of the territory of the State from the control of the State as sovereign. There is no such proposed violation of the State's territorial integrity in this case. To the contrary, the relief sought here is quite modest – mere access to records.

And a majority of Justices in *Coeur d'Alene* and again in *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), rejected the more elaborate balancing approach urged by the two-Justice plurality in *Coeur d'Alene*. Yet that is the approach apparently followed by the court of appeals here.

2. In any event, even if balancing akin to that discussed by the two-Justice plurality in *Coeur d'Alene* were appropriate, an original action for a writ of mandamus in the Supreme Court of Virginia does not offer petitioner a prompt and effective remedy.

Moreover, the nature and purpose of this action warrants a federal forum. Although this suit is brought by petitioner to obtain records, the ultimate purpose is to protect persons with disabilities and mental illness from abuse and neglect at the hands of state officials. Indeed, the legislative history of the Developmental Disabilities Act and subsequent legislation shows that Congress encouraged the creation of independent Protection and Advocacy Systems because the States were not able to monitor and prevent abuse and neglect in state institutions through existing mechanisms.

Finally, because this is a dispute about federal law, there is an important federal interest in uniformity of interpretation that weighs in favor of a federal court adjudicating the claim. Permitting federal courts to grant "relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

ARGUMENT

STATE-CREATED PUBLIC ENTITIES CAN SUE IN FEDERAL COURT UNDER *EX PARTE YOUNG* TO BRING OTHER OFFICIALS OF THAT STATE INTO COMPLIANCE WITH FEDERAL LAW

The Eleventh Amendment does not bar this action for prospective relief to remedy an ongoing violation of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908), authorizes this suit.

Petitioner claims entitlement as a matter of federal law to access certain records. Respondents state officials claim state law prohibits them from releasing those records. Petitioner, in turn, contends that federal law preempts that state law. And petitioner seeks declaratory and injunctive relief from a federal court on the ground that the state law interposed by the state officials is void under the Supremacy Clause. If petitioner were a private entity, as respondents themselves acknowledge, *Ex parte Young* would authorize this suit and "there would be no sovereign immunity issue." Resp. C.A. Opening Br. 26.

But the fact that petitioner is a state-created public entity does not change the analysis of the sovereign immunity inquiry. Allowing a federal court to resolve questions of federal law to guide the future conduct of the state officials on both sides of this controversy does not implicate the fiscal or dignitary interests of the State any more than when only the defendants are state officials.

A. The *Ex Parte Young* Doctrine Reflects A Historical Tradition That Protects The State Sovereignty Interests Animating The Eleventh Amendment While Permitting Vindication Of The Supremacy Clause

1. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has treated the Eleventh Amendment as reflecting a broad vision of state sovereign immunity rooted in common law traditions and federalism that

extends well beyond the text of the Eleventh Amendment.

At the same time, however, this Court has been careful to avoid creating a situation where federal courts lack authority to curb state violations of federal law in contravention of the Supremacy Clause. Thus, well before *Hans*, the Court distinguished between plaintiffs suing the sovereign in its own name and those suing the sovereign's officials. *See, e.g.*, *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 859 (1824); *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220-221 (1873); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *United States v. Lee*, 106 U.S. 196, 219-222 (1882); *Virginia Coupon Cases*, 114 U.S. 270, 288 (1885).

That distinction was consistent with the "notions of sovereignty" prevailing at the time of the Constitution's framing. *Central Virginia Comm'y Coll. v. Katz*, 546 U.S. 356, 389 (2006) (Thomas, J., dissenting); *see Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989) (distinction between State and state officials sued for injunctive relief "would not have been foreign" to those in the Nineteenth Century). That is because it was well-settled doctrine in England that suits could proceed against the King's officials even though a suit could not proceed against the King himself, as sovereign. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); X William Holdsworth, *A History of English Law* 650-652 (1938).

This Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), encapsulated a century's worth of American jurisprudence as well as prior English jurisprudence. And it has become an "essential * * * part of [the Nation's] sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). *Ex parte Young* confirmed that the Eleventh Amendment did not bar a suit in federal court for prospective injunctive relief claiming that a state official was violating federal law. That result was "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160). To that end, this Court has unwaveringly held that "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *see also Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).

2. While *Ex parte Young* guarantees the enforcement of federal laws against state officials, it does so without offending basic principles of state sovereignty. As this Court has recognized, the Eleventh Amendment was ratified to protect both a State's treasury, *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821), and its dignity, *see Ex parte Ayers*, 123 U.S. 443, 505 (1887).

To address the Eleventh Amendment's concern for protection of state treasuries, *Ex parte Young* does

not permit retroactive damage awards. *See Frew*, 540 U.S. at 437 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). Rather, it permits only "prospective relief as well as measures ancillary to prospective relief." *Ibid.* (citations omitted).

To protect the dignity of the State, *Ex parte Young* suits are further limited in two respects. First, *Ex parte Young* does not permit suits against the State *in eo nomine* – i.e., actions directly against the sovereign in the sovereign's own name – and permits only suits against individual state officials. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). This requirement comports with the common law rationale that a state official who violates federal law exceeds his authority and is no longer shielded by the State's immunity. *See* Jaffee, *supra*, at 18-19.

And second, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, its scope is limited to the enforcement of federal law. A plaintiff thus must allege that the Constitution or a federal law has been violated and not simply that state officials have violated state law. *See Pennhurst*, 465 U.S. at 121.

3. Petitioner's suit is a classic *Ex parte Young* action. Petitioner alleges that respondents, state officials, are violating federal law by not providing petitioner access to the requested documents, and petitioner seeks only prospective injunctive and declaratory relief. Indeed, respondents have

acknowledged that if this suit had been brought by an entity chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. Resp. C.A. Opening Br. 26 ("If VOPA were a non-profit entity rather than a state agency, there would be no sovereign immunity issue."). That should be the end of the inquiry. *Ex parte Young*'s recognition of federal judicial power in suits against state officers to enjoin ongoing violations of federal law strikes the requisite balance between state and federal interests. Where these conditions are met, no additional "balancing" is required or warranted.[7]

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[7] Whether or not petitioner's claim to access to the records is correct on the merits is irrelevant to whether *Ex parte Young* applies. *See Verizon Maryland*, 535 U.S. at 646 ("the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim"). When VOPA returns to district court, it will show that its claim to the peer review records is meritorious, as every federal court of appeals has found. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365 (7th Cir. 2010) (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.).

B. The Identity Of The Plaintiff As An Independent State Entity Is Not Relevant To Whether *Ex Parte Young* Applies

The Fourth Circuit adopted a per se rule that, because petitioner is a state agency, the Eleventh Amendment does not allow a federal court to adjudicate whether state officials, in contravention of the Supremacy Clause, are violating federal law. That was error. As the Seventh Circuit explained en banc, "the *Ex parte Young* doctrine focuses on the identity of the defendant and the nature of the relief sought, not on the nature or identity of the plaintiff." *Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) ("*IPAS*") (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131).

The Fourth Circuit's opposite holding is unmoored in the purposes underlying the Eleventh Amendment and ignores the contrary historical evidence.

1. Neither the fiscal nor dignitary accommodation achieved in Ex parte Young *is altered when the plaintiff is a public entity*

a. The fiscal interest in protecting the state treasury is unaffected by the nature of the plaintiff. In this case, like all other *Ex parte Young* suits, the requested relief is limited to prospective equitable relief. Petitioner here seeks only access to records.

Nor do any dignitary interests underlying the Eleventh Amendment justify narrowing *Ex parte Young* to exclude suits where public entities are plaintiffs.

This Court has never limited who the plaintiff can be in an *Ex parte Young* suit. Such suits can be brought by individuals, corporations, Indian Tribes, and foreign nations, assuming they can identify an alleged violation of a federal law or the Constitution. It would be incongruous to suggest that an *Ex parte Young* suit by an agency of a foreign country or another State "accord[s] States with the dignity that is consistent with their status as sovereign entities," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002), while a suit by a state agency that a State has created and given independent litigating authority does not. *See* pages 17-20, *supra*. And there is nothing in the history of the Eleventh Amendment to support such a distinction.

If anything, because the same sovereign created the parties on both sides of a lawsuit such as this one, it is actually less an affront to the sovereign than when a sovereign is sued by a private party or another sovereign (such as a foreign nation or Indian Tribe). This is because, ultimately, the sovereign retains the authority to dissolve the plaintiff it created if it believes the litigation (or the resulting relief) is too onerous.

There is nothing anomalous about permitting an entity created by the State to sue the State's officials in federal court under *Ex parte Young*. To the contrary, this happens regularly with regard to private corporations. The plaintiff in *Verizon Maryland*, 535 U.S. 635, for example, was incorporated by Maryland and sued Maryland state officials. Numerous other cases relying on *Ex parte Young* have the same fact-pattern.

While petitioner is a part of the state government, its independence makes it not unlike a private corporation, for present purposes at least. Petitioner is not subject to the control of the Governor – the Governor appoints only a minority of the board that governs petitioner, and members of that board can only be removed for cause through a judicial proceeding. *See* page 17, *supra*. Further, petitioner's litigation is not subject to the control of Virginia's Attorney General. *See* pages 17-18, *supra*. And none of its funds come from Virginia's general revenues. *See* page 18, *supra*. Neither respondents nor any member of the Virginia executive branch, therefore, can cause petitioner to compromise its federally-established statutory right to records from respondents or its federally-established statutory duty to protect persons with disabilities and mental illness. Petitioner is thus no differently situated for *Ex parte Young* purposes from any corporation chartered by Virginia seeking to enforce federal law against state officials.

As noted above, the federal government required this independence if Virginia wanted to continue accepting federal funds under the Developmental Disabilities Act. *See* pages 8-9, 15-17, *supra*. "Congress thus has provided as a matter of federal law that [petitioner] is insulated from the type of state control over policy, budget, personnel, and governance that could justify treating this as an 'intramural' dispute." *IPAS*, 603 F.3d at 373.

b. Some additional evidence of this lack of indignity is the failure of States to previously object to suits by state entity Protection and Advocacy Systems. In the more than 30-year history of Protection and Advocacy Systems, no defendant ever previously claimed that a state entity Protection and Advocacy System could not rely on *Ex parte Young* to bring a suit against state officials. To the contrary, the federal courts have uniformly and without question adjudicated suits brought by Protection and Advocacy Systems against state officials. *See, e.g., Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 97 F.3d 492 (11th Cir. 1996) (state system); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.) (state system); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303 (D. Conn. 2003) (state system).

Indeed, in the suit recently brought by Indiana's state entity Protection and Advocacy System against

Indiana state officials, the state officials did not raise the Eleventh Amendment in either the district court or in their appellate briefs to the panel. The state officials did not press the issue until the en banc proceeding, when they simply defended a panel opinion that had sua sponte relied on that ground based on the Fourth Circuit's decision. *See IPAS*, 603 F.3d at 370-371. In reversing the panel, the en banc Seventh Circuit observed that the state officials' "failure to raise the Eleventh Amendment * * * makes it difficult to see how this lawsuit poses a serious threat to any special sovereignty interest of the state." *Id.* at 373.

This is true of respondents as well. Petitioner has been a plaintiff in three other federal court cases against agencies and officials of Virginia since obtaining its current independent status. Nevertheless, it was not until 2008 in this case that the Attorney General first raised an Eleventh Amendment challenge based on petitioner's status as a state entity.[8]

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[8] *See VOPA v. Virginia Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003); *VOPA v. Reinhard*, No. 04-cv-54 (E.D. Va.) (filed Jan. 22, 2004), rev'd, 405 F.3d 185 (4th Cir. 2005); *VOPA v. Finnerty*, No. 04-cv-587 (E.D. Va.) (filed Aug. 16, 2004). Indeed, in the *Reinhard* action, the Virginia Attorney General acknowledged in the district court that the "doctrine of *Ex parte Young* confers jurisdiction on this Court to enter such an order" that "direct[s] the Commissioner to conform to VOPA's interpretation" of federal law. Def. Br. in Opp. to Pl. Mot. for Attorney's Fees and Costs at 2, *VOPA v. Reinhard*, No. 04-cv-54 (E.D. Va. May 7, 2004); *see also id.* at 3 n.1 ("As explained above, this suit

(Continued on following page)

c. Much of respondents' objection to this suit is rooted in the fact that petitioner claims to have federal rights against components of the State that created it. Br. in Opp. 20; *cf.* Pet. App. 18a (objecting to "[s]plintering a state's internal authority" and "excessive federal meddling with their internal authority"). But that has no bearing on the Eleventh Amendment analysis or application of *Ex parte Young*.

To be sure, a federal law that unilaterally vested one component of a state with federal rights against other components of that State might raise Tenth Amendment concerns because of the possibility of dividing the State against itself. But that is not the case here. In enacting the Developmental Disabilities Act and the PAIMI Act, Congress did not so "turn the State against itself." *Alden*, 527 U.S. at 749. Rather, the federal right to access records that petitioner claims in this case derives from two voluntary choices made by the State. First, Virginia chose to establish a Protection and Advocacy System in order to be eligible to receive certain federal funds under the Developmental Disabilities Act. Br. in Opp. 2 ("Congress encourages the states to create entities like

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is properly characterized as an action under the doctrine of *Ex Parte Young* and the Commissioner does not dispute VOPA's ability to bring an action under the doctrine of *Ex Parte Young*."). On appeal in that action, the Virginia Attorney General, for the first time, indicated that his concession might not apply to future suits. Br. of Appellant at 2 n.4, 11 n.10, *VOPA v. Reinhard*, No. 04-1794 (4th Cir. Sept. 1, 2004).

VOPA"). This is a real choice. Indeed, as noted above, for a period of time, Virginia elected not to participate in that program. *See* pages 12-13, *supra*.

Second, Virginia elected to constitute petitioner as a public entity, rather than as a not-for-profit corporation. This was a choice entirely of its own accord. The federal funds under the Developmental Disabilities Act have always been available regardless of the State's choice in that regard. Br. in Opp. 3 ("States may choose to make their protection and advocacy systems either public agencies or private, nonprofit entities."). Indeed, most States elect to designate private, nonprofit entities as their Protection and Advocacy Systems. When the program first started, sixteen States had public entities as their Protection and Advocacy Systems. Now, based on the States' own choices, that number is eight.

Given these two voluntary decisions by Virginia, only one of which was influenced by the enticement of federal dollars, respondents can hardly complain that it has been splintered by the federal government. *See Alden*, 527 U.S. at 755 (citing with approval *South Dakota v. Dole*, 483 U.S. 203 (1987)). To the contrary, as the Seventh Circuit noted in *IPAS*, it would be "strange" if a State's "own choice to set up an independent state agency * * * shield[ed] its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens." 603 F.3d at 373.

d. The sovereign immunity theory espoused by respondents has no logical limit.

Nothing in the decision below would limit that ruling to preclude only enforcement of federal *statutes* in federal court by state agencies against other state officials. Under the Fourth Circuit's rationale, and the arguments advanced by respondents, the decision also would preclude enforcement of any federal constitutional rights a state entity might have.

Such a result would run counter to this Court's suggestion that state-created entities may be imbued with and may enforce federal constitutional rights. For example, this Court has suggested that public universities may have a constitutionally-protected interest in academic freedom and that public libraries may have First Amendment rights. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *United States v. American Library Ass'n*, 539 U.S. 194, 210-212 (2003) (plurality); *see also City of Charleston v. Public Serv. Comm'n of West Virginia*, 57 F.3d 385, 389-390 (4th Cir.) (contract between city and third party may be protected from state interference by Contract Clause), cert. denied, 516 U.S. 974 (1995); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1290-1292 (6th Cir.) (school district can sue state officials who were commanding it to violate Equal Protection Clause), cert. denied, 417 U.S. 932 (1974). Yet under respondents' theory, there would be no way those claims could be brought against state officials in federal court under *Ex parte Young*.

2. *Denying public entities the right to sue other government officials is contrary to historical practice*

The court of appeals was incorrect to view suits by public entities against state officials as "anomalous or unheard of when the constitution was adopted." Pet. App. 15a, 21a (quoting *Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18)). At the time of the Constitution's ratification and the ratification of the Eleventh Amendment, it was already well established in England that courts could entertain suits by governmental entities created by the King against the King's officials or other governmental entities created by the King. Thus, an action with governments (or their officials) on both sides of the proceeding was not "unknown to the law." *Hans*, 134 U.S. at 15.

For example, in England, towns were permitted to sue the county sheriff. In England, the sheriff was an "executive officer of the Crown." *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 793-794 (1997) (quoting C. Wigan & D. Meston, *Mather on Sheriff and Execution Law* 2 (1935)). Towns and other governmental bodies likewise were created by the King. *See* 1 Stewart Kyd, *A Treatise on the Law of Corporations* 28 (Garland Publishing, Inc. 1978) (1793-1794). Yet the courts of England were open to actions by a town claiming that the sheriff was infringing rights granted to it by the King. The leading treatise on the law of corporations declared in 1793 that "[i]f a grant be made to the corporation of a town [by the King] that [the town] shall have the return

of writs within the town, and that the sheriff of the county shall not intromit, [the town] may have an action on the case against the sheriff, if he enter and serve process." 1 Kyd, *supra*, at 190 (citing *Town of Darby v. Foxley*, (1615) 81 Eng. Rep. 370, 1 Rol. Rep. 118 (K.B.)); *accord* 4 Sir John Comyns, *A Digest of the Laws of England* *353 note (m) (Philadelphia, J. Laval & Samuel Bradford & New York, Collins & Hannay 5th ed. corr. 1825) (same).

Another example of governmental parties suing each other in courts in England involved disputes between different political subdivisions created by the King. For example, despite defendants' objection "that the [municipal] corporation ought not to have the action," an "action was held to be maintainable" by "the mayor and commonality of Lincoln" against "the mayor, bailiffs and commonality of Derby." 1 Kyd, *supra*, 191; *see also id.* at 314-315; *Mayor of the City of London v. Mayor of the Borough of Lynn Regis*, (1796) 126 Eng. Rep. 1026, 1040 (H.L.) (House of Lords affirming ability of London to sue other local governments in its own name).[9]

During the Nineteenth Century, moreover, when England adopted an early version of revenue sharing for political subdivisions, the courts entertained suits

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[9] *See also County of Salop v. County of Stafford*, (1665) 82 Eng. Rep. 1051 (K.B.); *County of Worcester v. Town of Evesholm*, (1686) 90 Eng. Rep. 116 (K.B.); *Corporation of London v. Corporation of Liverpool*, (1796) 145 Eng. Rep. 1024 (L.R. Exch.).

by a county against government officials claiming that the officials were not complying with the law. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 17-18 (1963). Although the county lost the suit on the ground that monetary relief could not be obtained, *id.* at 17 & n.52 (citing *R. v. The Lords Commissioners of the Treasury*, (1871-1872) 7 L.R.Q.B. 387, 1872 WL 14191), the propriety of political subdivisions bringing suit against other entities created by the King was not questioned. *Ibid.*

These examples show that two adverse governmental parties could seek and obtain a judicial resolution in the King's court of a dispute as to whether the defendant's conduct was consistent with the supreme law of England. Of course, because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard. But that difference is not a bar to relying on such historical practice, because cases like *Alden*, citing *Hans*, have looked to English case law in determining whether the Eleventh Amendment prohibited a particular suit. *See Alden*, 527 U.S. at 715-716.

The adjudication of such suits in England demonstrates that these suits are not new phenomena requiring the development of a new set of rules governing sovereign immunity. Rather, these suits were historically-recognized suits that warrant application of historically-established rules, reflected in *Ex parte Young*. Thus, because the dispute here is

about federal law, adverse parties representing two state-created governmental entities should be able to obtain resolution of their legal dispute in federal court to govern their actions prospectively.

3. This Court's cases addressing suits brought by political subdivisions weigh in favor of applying Ex parte Young

Respondents have cited four cases that they claim establish that "political subdivisions may not invoke *Ex parte Young* against state officials of the same State." Br. in Opp. 16 (citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Stewart v. City of Kansas City*, 239 U.S. 14 (1915); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)).

As the court below recognized (Pet. App. 23a), those cases did not rely on the Eleventh Amendment. Indeed, none of those cases involved suits against States or state officials.[10] In each case, the municipality did not prevail in its challenge to a state law because of the broad authority States have in organizing and reorganizing their political subdivisions. *See Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960)

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[10] In *Williams*, the City of Baltimore was the plaintiff and the defendant was a receiver for a railroad. In *City of Trenton*, New Jersey was the plaintiff and the city was the defendant. In *Stewart*, Kansas City was the plaintiff and the defendant was a county treasurer. And in *Hunter*, the City of Allegheny and its residents were the plaintiffs and the defendant was the City of Pittsburgh.

(the "correct reading" of those cases is that a "State's authority [was] unrestrained by the particular prohibitions of the Constitution considered in those cases").[11] Those cases thus shed no light on the question whether a state-created public entity that possesses a federal right against its creator may rely on *Ex parte Young* to seek relief against state officials in federal court.

More relevant are this Court's cases in which the Court has resolved disputes on the merits between political subdivisions (or their officials) and state officials brought originally in federal district court. *See Papasan v. Allain,* 478 U.S. 265 (1986) (holding that plaintiffs, including Papasan, a school board superintendent, could rely on *Ex parte Young* to bring federal constitutional claim against state official); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982) (holding school district was entitled to attorneys' fees for prevailing on federal constitutional claim against state official); *see also Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259-260 n.6 (1985) (criticizing, in dicta, federal court for dismissing earlier suit between

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[11] *Accord Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), cert. denied, 444 U.S. 827 (1979); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998) (agreeing with *Rogers* that "[n]either the *Williams/Trenton* line of cases nor any other subsequent Supreme Court case has held that a political subdivision is barred from asserting the structural protections of the Supremacy Clause of Article VI in a suit against its creating state"), cert. denied, 526 U.S. 1068 (1999).

county and school district for lack of federal jurisdiction). Yet the ruling below apparently would preclude all of those lawsuits.

C. *Coeur d'Alene* Does Not Limit Petitioner's Ability To Rely On *Ex parte Young*

Respondents rest (Br. in Opp. 14-15, 18-20, 28) primarily on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to suggest that the court of appeals was free to engage in an ad hoc balancing of interests to determine whether petitioner could rely on *Ex parte Young*. But *Coeur d'Alene* involved relief that was virtually sui generis. The case thus cannot be read as broadly as respondents urge, particularly in light of the Court's subsequent decision in *Verizon Maryland*. In any event, even if as-applied balancing were appropriate, petitioner should nonetheless be permitted to proceed under *Ex parte Young* in the circumstances here.

1. Coeur d'Alene *focused on the extraordinary relief sought that would have essentially carved territory from the State, while the relief sought here is typical prospective relief*

a. In *Coeur d'Alene*, five Justices, in opinions reflecting two different rationales, held that, under the "particular and special circumstances" of that case, *Ex parte Young* was not available when "the declaratory and injunctive relief the [Indian] Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership

and control would shift from the State to the Tribe." 521 U.S. at 287, 282. Specifically, the plaintiffs in that case sought an injunction to carve out part of the territory of the State from the control of the State as sovereign. "The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id.* at 282.

The portions of the opinion in *Coeur d'Alene* joined by a majority of Justices focused exclusively on the "type of relief" sought to determine whether the suit was "barred by the Eleventh Amendment" or "permitted under *Ex parte Young*." *Id.* at 281 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)); *see also id.* at 282 (describing "far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action").

There is no such proposed violation of the State's territorial integrity in this case. To the contrary, the relief sought here is quite modest – mere access to records. Indeed, state officials' turning over documents is part of the ordinary course of discovery in any *Ex parte Young* suit, which often seeks some significant official action, such as reinstatement of an employee, release of a prisoner, or payment of future benefits. *See, e.g.*, *Edelman*, 415 U.S. at 668; *Ex parte Young*, 209 U.S. at 168. In this case, by contrast, all petitioner wants is certain documents. No other relief is requested. J.A. 21-22. Nothing in

the controlling portions of *Coeur d'Alene* suggests such relief is unavailable under *Ex parte Young*.

b. To be sure, the lead opinion in *Coeur d'Alene*, authored by Justice Kennedy but joined in whole only by then-Chief Justice Rehnquist, would have applied a "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," including consideration of whether there was a "prompt and effective remedy in a state forum." 521 U.S. at 278, 274. That broader inquiry appears to be the approach adopted by the court of appeals below.

But that inquiry was rejected by the other seven justices in *Coeur d'Alene*. And after *Coeur d'Alene*, this Court rejected the balancing approach urged by the plurality in that case. In *Verizon Maryland*, the Court held that *Ex parte Young* required only a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment), and citing *id.* at 298-299 (Souter, J., dissenting)). *Verizon Maryland* thus reversed a Fourth Circuit decision that had held that the Eleventh Amendment barred an *Ex parte Young* action against state officials because "of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials." *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 295 (4th Cir.

2001). Yet that is the approach apparently followed by the Fourth Circuit in this case as well.

2. *Even if balancing were appropriate, this suit should still be permitted to proceed under* Ex parte Young

In any event, even if balancing akin to that discussed by the two-Justice plurality in *Coeur d'Alene* were appropriate, Virginia courts do not offer a prompt and effective remedy and the nature and purpose of this action warrants a federal forum.

a. Respondents represented that petitioner "is not able to bring this action in a state trial court of general jurisdiction" because the trial courts "lack the authority to issue writs of mandamus against state officials." Br. in Opp. 25 n.10. Instead, according to respondents, VOPA may only bring "an original action for writ of mandamus in the Supreme Court of Virginia." Br. in Opp. 25.

That supposed remedy is neither "prompt" nor "effective." Under Virginia law, the availability of the "extraordinary remedial process" of mandamus is contingent on "judicial discretion" that is exercised with cognizance of its "drastic character." *Gannon v. State Corp. Comm'n,* 416 S.E.2d 446, 447 (Va. 1992).

Writs of mandamus do not have the flexibility of equitable remedies. Interim relief is not available. A temporary or preliminary writ of mandamus is not available. *See IPAS*, 603 F.3d at 374 n.7. Nor is there any evidence that the Virginia Supreme Court could

have ordered respondents, as the district court did in this case (J.A. 36-37), not to destroy or alter the documents sought by petitioner pending resolution of the action. A forum that lacks the authority to prevent such irreparable harm could hardly be considered effective.

Further, if there are any fact disputes, there appears to be no mechanism for factfinding in an original proceeding. The Virginia Supreme Court rules provide for taking depositions in original actions. *See* Va. Sup. Ct. R. 5.7(d). But no other forms of discovery (such as interrogatories) are authorized. And petitioner is aware of no mechanism for the Court to resolve factual disputes that turn on credibility (such as whether particular documents exist) based on deposition testimony alone. *Cf. IPAS*, 603 F.3d at 369 n.2 (factual dispute on whether all records were turned over); Melissa Bowman, Note, *Open Debate Over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 KY. L.J. 955, 972-974 (1996-1997) (discussing case in which compliance with earlier injunction was disputed). Thus, the Virginia Supreme Court has held that it "is not equipped to determine factual issues." *Stroobants v. Fugate*, 163 S.E.2d 192, 194 (Va. 1968).

b. Another factor discussed by the plurality in *Coeur d'Alene* also weighs in favor of federal court exercising authority over this case. The plurality suggested that when the "ultimate purpose" of a complaint "was to vindicate the plaintiffs' civil

liberties," federal court involvement was more appropriate. 521 U.S. at 279 (plurality opinion). Although this suit is brought by petitioner to obtain records, the ultimate purpose is to protect persons with disabilities and mental illness from abuse and neglect at the hands of state officials. *See, e.g.*, S. Rep. No. 99-109, at 9-10 ("in order to ensure the protection of mentally ill persons," a Protection and Advocacy System has a "need for full access to facilities and clients and to their records" to "help protect currently established rights articulated in Federal and State laws or under the Constitution of the United States"). Such abuse and neglect often constituted actual or incipient violations of the Fourteenth Amendment. *See* pages 2-3, 6-7, *supra*.

Indeed, the legislative history of the Developmental Disabilities Act and subsequent legislation shows that Congress encouraged States to designate entities as independent Protection and Advocacy Systems because the States were not able to properly monitor and prevent such abuse and neglect in state institutions through existing mechanisms. *See* pages 3-5, 7, *supra*. "In a sense, given its unusual independence from state government, the special federal responsibilities it carries out, and the direct federal funding it receives, [petitioner] is closer to being a specialized agent of the federal government for these purposes than it is to being an ordinary state agency." *IPAS*, 603 F.3d at 373. This was, in fact, the view of one of the primary sponsors of these Acts. Senator Weicker explained that "the whole purpose of [the

Protection and Advocacy Systems] was, very simply, that one Congressional oversight hearing every ten years was not adequate protection for persons in mental institutions." *Protection and Advocacy for Mentally Ill Individuals Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 100th Cong. 76 (1988). Thus, Congress "clothed [the Systems] with the indicia of official status" so that they could "get[ ] into the institutions." *Ibid.*

c. Finally, because this is a dispute about federal law, there is an important "federal interest in uniformity" of interpretation that weighs in favor of a federal court adjudicating the claim. *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment). Acknowledgement of that federal interest does not "suggest that state courts are inadequate to apply federal law." *Ibid.*; *see also id.* at 313 (Souter, J., dissenting) (access to federal courts "addresses not the adequacy of a state judicial system, but the responsibility of federal courts to vindicate what is supposed to be controlling federal law"). Instead, it simply accepts that permitting federal courts to grant "relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AUGUST 24, 2010

RESPONDENT'S BRIEF

No. 09-529

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES W. STEWART, III, in his official capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and VICKI Y. MONTGOMERY, in her official capacity as Acting Director, Central State Hospital,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

As restated by the Virginia defendants, the Question Presented is whether this Court should extend *Ex parte Young* to empower state agencies to sue their parent States through state officers in federal court without a congressional abrogation of sovereign immunity and without obtaining the consent of the States through waiver.

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Virginia Attorney General Kenneth T. Cuccinelli, II, submits this Brief of Respondents on behalf of the Virginia defendants.

I.

STATEMENT OF THE CASE

This suit was filed in the United States District Court for the Eastern District of Virginia on December 3, 2007 in the name of the "Commonwealth of Virginia, Virginia Office for Protection and Advocacy." (J.A. at 10). The defendants were "JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital."[1]

The Virginia Office for Protection and Advocacy (VOPA) is a Virginia state agency that serves as the Commonwealth's protection and advocacy system. *Va. Code Ann.* §§ 51.5-39.2—51.5-39.12 (statutory establishment of VOPA). It is independent in the sense that no one of the three appointing authorities

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[1] With the recent change in administration in Virginia, James W. Stewart, III, in his official capacity, was substituted for Reinhard and Vicki Y. Montgomery, in her official capacity, was substituted for Davis.

(Speaker of the House, Senate Committee on Rules, and Governor) appoint a majority of VOPA's governing board. (Pet. at 75a-76a). Congress encourages the States to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of the Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("PAIMI Act"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. §§ 15001-15115. Under these acts, States may choose to make their protection and advocacy systems either state agencies or private, nonprofit entities. *See* 42 U.S.C. §§ 10805(c)(1)(B), 15044(a). *See also* 45 C.F.R. § 1386.20.

Consistent with federal law, VOPA has the authority to engage in various pursuits on behalf of individuals with mental illness and other disabilities, such as investigating complaints of discrimination, abuse, and neglect. *Va. Code Ann.* § 51.5-39.4 (2009). *See also* 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I)-(J). As part of its investigation into the death of two persons, and the serious injury of another, in facilities operated by the Department, VOPA requested certain "peer review" records. VOPA contends that the PAIMI Act and the DD Act require the Virginia Officials to produce the records.

The Virginia Official Defendants disagreed. Two federal regulations, 42 C.F.R. § 51.41(c)(4)[2] and 45 C.F.R. § 1386.22(c)(1),[3] explicitly exempt peer review

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[2] This federal regulation, which implements the PAIMI Act, provides in pertinent part:

> (c) Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to the P&A system under the Act shall include, but not be limited to:
>
> (4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

42 C.F.R. § 51.41(c)(4) (emphasis added).

[3] This federal regulation, which implements the DD Act, provides in pertinent part:

> (c) Information in the possession of a facility which must be available to P&A systems in investigating instances of abuse and neglect under section 142(a)(2)(B) (whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records) shall include, but not be limited to:
>
> (1) Information in reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for a facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State*

(Continued on following page)

materials from disclosure if such records are privileged under state law.[4] Because Virginia has a state law protecting the disclosure of peer review material, *Va. Code Ann.* §§ 8.01-581.16 (2007) and 8.01-581.17 (Supp. 2010), and a state law that specifically prohibits VOPA from obtaining these records, *Va. Code Ann.* § 51.5-39.4(4), the federal regulations facially permit the Virginia defendants to refuse to disclose the materials.

When the two state agencies were unable to resolve their dispute,[5] and after VOPA sued the

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law protecting records produced by medical care evaluation or peer review committees.

45 C.F.R. § 1386.22(c)(1) (emphasis added).

[4] Five Circuits have declared that one or both of the regulations are invalid. *See Indiana Prot. & Advocacy Servs. v. Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 382-83 (7th Cir. 2010) *en banc*, *pet. for cert. filed*, No. 10-131 (filed July 21, 2010); *Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119, 125-26 (2d Cir. 2006) (Sotomayor, J.); *Missouri Protection & Advocacy Services v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1024 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427-28 (3d Cir. 2000) (Alito, J.). The United States has neither withdrawn the regulation nor conceded its invalidity, although it has been under regulatory review since 2008. 73 Fed. Reg. 19176, 19708-09, 19731-32. Virginia agrees that the merits question of entitlement to records is not before the Court. (U.S. Amicus Br. at 5 n.3.)

[5] Virginia offered to turn over the documents, provided they are not disclosed to third parties or used in litigation against the

(Continued on following page)

Virginia defendants in district court seeking declaratory and injunctive relief, the Virginia defendants moved to dismiss for failure to state a claim and on the basis of sovereign immunity. The district court denied the motion on both grounds. (*Id.* at 30a-46a).

First, the district court held that VOPA had stated a claim for violation of federal law. In doing so it ruled that the claim of a peer review privilege could not be reached on a Fed. R. Civ. P. 12(b)(6) motion because it was an "affirmative defense to the merits." (*Id.* at 34a 35a).

Second, the district court held that sovereign immunity did not bar VOPA's suit. (*Id.* at 35a-45a). After noting that abrogation of sovereign immunity was not at issue in this case (*id.* at 35a), the court also rejected the argument that Virginia had waived its sovereign immunity. (*Id.* at 36a-40a). Nonetheless, the district court found that *Ex parte Young*, 209 U.S. 123 (1908), applied (*id.* at 40a-42a), overruling the objection that *Young* does not permit a suit in federal court by one state agency against officials of another agency of the same State. (*Id.* at 43a-45a).

Because a denial of sovereign immunity is a final order under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506

Department of Behavioral Health and Developmental Services. VOPA rejected this offer. J.A. at 44

U.S. 139, 143-44 (1993), the Virginia defendants appealed. Because the denial of a motion to dismiss for failure to state a claim is not, that aspect of the ruling was not appealed.

On appeal, the Fourth Circuit reversed (*id.* at 1a-29a), agreeing that Congress had not abrogated Virginia's sovereign immunity (*id.* at 8a-10a), and that Virginia had not waived its sovereign immunity. (*Id.* at 10a-13a). Turning to *Young*, Judge Wilkinson's opinion for a unanimous panel made five points.

First, VOPA's status as a state agency is critical to the question whether it can invoke *Young*. (*Id.* at 13a-17a). Although *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,* 535 U.S. 635 (2002), establishes that the invocation of *Young* ordinarily requires nothing more than an allegation of an on-going violation of federal law and a prayer for prospective relief, the inquiry is more complex when a state agency seeks to sue state officials in federal court. (*Id.* at 14a). Characterizing the question as novel, the panel decision relied on those portions of the principal opinion in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 281 (1997), in which five justices joined, and on Justice O'Connor's concurrence, in which Scalia, J., and Thomas, J., joined. (*Id.* at 16a).

Second, the panel held that principles of dual sovereignty prevent federal courts from adjudicating this dispute. Relying on *Alden v. Maine,* 527 U.S. 706 (1999), and *Pennhurst State Sch. & Hosp. v.*

Halderman, 465 U.S. 89 (1984), the Fourth Circuit found that "a federal court, without the imprimatur of Congress or the consent of the state, [is not allowed] to resolve a dispute between a state agency and state officials." (*Id.* at 19a). As the court of appeals explained:

> Recognizing an inherent power in the federal courts to settle this sort of internecine feud—"to turn the State against itself"—would disparage the status of the states as sovereigns. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability.

(*Id.* at 19a-20a) (citations omitted).

Third, the Fourth Circuit was persuaded that this Court's "cases related to the political subdivisions of the states [recognize] that alleging a violation of federal law does not itself override the states' interest in maintaining their sovereignty with respect to internal state conflicts." (*Id.* at 22a). While those cases did not involve sovereign immunity, the opinion stated that "these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged

violation of federal law, the *nature of the party* making the federal claim implicated the state's interest in keeping its internal authority intact." (*Id.* at 23a) (emphasis in original).

Fourth, the court of appeals noted that "[t]he state officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks here." (*Id.* at 25a). Litigating the issues in state court would not lead to inconsistent or erroneous applications of federal law (*id.* at 25a-26a), because this Court could review any decision of the Supreme Court of Virginia interpreting federal law, and VOPA's mere convenience in seeking a forum did not justify diminishing Virginia's sovereignty. (*Id.* at 26a).

Fifth, the Fourth Circuit held that VOPA's status as an independent state agency does not empower VOPA to sue state officials in federal court. The Fourth Circuit also noted that allowing state agencies to sue state officials in federal court might result in numerous lawsuits involving public universities and, conceivably, every agency that receives federal funds. (*Id.* at 26a-28a).

In sum, the Fourth Circuit believed that "allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states." (*Id.* at 29a). Hence, the court held that "expanding *Ex Parte Young* to permit a suit in these circumstances cannot be

reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." (*Id.* at 29a) (citation omitted).

Although VOPA sought rehearing *en banc*, the court of appeals denied the petition (*id.* at 47a-48a), and this Court granted certiorari.

II.

SUMMARY OF ARGUMENT

Whether a state agency can sue state officials under *Ex parte Young* to obtain access to state papers lawfully held by other state agencies is a novel issue of first impression. Of course, VOPA in this case, and the Seventh Circuit in *Indiana Protection & Advocacy Servs.*, 603 F.3d 365, disagree, viewing such claims as a garden variety application of the *Young* exception. But the issue is far more complex.

In the first place, Part II-A of *Coeur d'Alene Tribe*, 521 U.S. at 267-70, is a majority opinion which establishes the following propositions:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh

> Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction. *See, e.g., Pennhurst, supra*, at 102-103, 114, n.25 (explaining that the limitation in *Edelman v. Jordan*, 415 U.S. 651 (1974), of *Young* to prospective relief represented a refusal to apply the fiction in every conceivable circumstance).[6]

(*Id.* at 270). Because *Verizon Maryland*, 535 U.S. at 645-47, does not purport to overrule these principles, the Fourth Circuit correctly undertook a federalism analysis

When such a review is undertaken, it becomes immediately apparent that the parties and issues are not aligned in the normal or usual fashion where *Young* has been applied. The state officials are not the aggressors seeking to enforce an illegal state law in a way that is analogous to a constitutional tort. Nor are they alleged to have any personal duties under the federal statutes. Instead the federal commands—to the extent there are commands—run against the State itself. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994) (*Young* inapplicable

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[6] The Law Professor Amici mistakenly assert that the "obvious fiction" language is found in the plurality portion of Justice Kennedy's lead opinion. (Law Prof. Br. at 10 n.2).

when suit is really against the State and suit is really against the State when a law commands no state official by name or title to act but rather commands the State *qua* State to act.). Here, the requirement for access to records is not even a command. It is instead a condition for obtaining federal funds under a qualified plan. Not only could the federal government enforce its interpretation of what is required of the state by withholding funds, 42 C.F.R. § 51.4 (incorporating by reference 45 C.F.R. Part 92), but the statutes themselves contain federal oversight, reporting, and evaluation procedures intended to protect the federal interest. 42 U.S.C. § 10805(a)(5), (a)(7), (b); 42 U.S.C. § 15043(a)(2)(C); 42 U.S.C. § 15044(d), (e). This Court has refused to extend the reach of *Young* when Congress has provided statutory enforcement provisions. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996). Additionally, the fact that state papers are at issue makes the fiction that the Virginia defendants are not really acting on behalf of the State embarrassingly thin. (*See* U.S. Amicus Br. at 14) (*Young* not available "for divestiture of state property interests"). Furthermore, in this case, VOPA did not even honor the fiction. This is an official capacity suit on both sides of the "v." *See Duckworth v. Franzen*, 780 F.2d 645, 649 (7th Cir. 1985) (naming a defendant's office raises a presumption that suit is against the State).

There are a number of other considerations that support the conclusion that the Fourth Circuit correctly resorted to a federalism analysis to conclude

that *Young* should not be extended to permit suits of this character. Permitting one state agency to sue another truly is an extension of *Young* because this "Court has never used *Ex parte Young* to let one arm of a state sue another." *Indiana Prot. & Advocacy Servs. v. Indiana Family & Social Servs. Admin.*, 573 F.3d 548, 553 (7th Cir. 2009) *rev'd en banc*, 603 F.3d 365 (2010). *See also Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3159 (2010) ("'Perhaps the most telling indication of the severe constitutional problem . . . is the lack of historical precedent. . . .'") (citation omitted). Not only is there an absence of affirmative precedent, there is an actual presumption against such an extension. This Court recognizes "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

Historically, *Young* allowed independent targets of state action, not state government agencies, to vindicate federal rights when officials threatened illegal acts against them. *Seminole Tribe*, 517 U.S. at 71 n.14; *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001). VOPA's English examples do nothing to make the practice of the State suing the State less anomalous and unheard of. For example, English cities and towns in the seventeenth and eighteenth centuries were not units of government

in the American sense. They were chartered corporations against which a *quo warranto* would lie for forfeiture of their charters, making them more like private parties than States. *See, e.g.*, John Miller, *James II* at 113 (Yale Univ. Press 2000) (London's charter was declared forfeit on "legal pretexts" after "[t]he City's Whig sheriffs returned juries which acquitted Shaftesbury and other leading Whigs. . . ."). Furthermore, the crown's sovereign immunity protected "the dignity and . . . sovereignty of the royal person" from the "setting up" of "some superior power with authority to call him to account." 3 William Blackstone, *Commentaries on the Laws of England* at 254-55 (Clarendon Press Oxford 1768) (University of Chicago Press Facsimile 1979). When the doctrine of sovereign immunity was transported to America, it became an incident of state sovereignty. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 446 (1793) (Iredell, J., dissenting). Because in the United States sovereign immunity became a federalism issue, examples involving the unitary British government are simply inapt; as VOPA half-heartedly recognizes. (Pet'r's Br. at 47) ("Of course because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard.").

Although VOPA (*id.* at 30, 53), and its amici the United States (U.S. Amicus Br. at 12, 25-28), AARP, *et al.* (AARP Br. at 4, 14-17), and the National Disability Rights Network (NDRN Br. at 33-35), make the policy

argument that a federal district court is a superior forum to the original mandamus jurisdiction of the Supreme Court of Virginia, mandamus is the traditional exception to sovereign immunity, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the state forum provides an adequate remedy without raising the grave federalism issues associated with the extension of *Young* that VOPA and its amici seek.

The most serious implication that arises from state-agency-on-state-agency suits in federal court is that it would confer a power on Congress tantamount to the power to abrogate state sovereign immunity without the present doctrinal limitations and protections for state sovereignty. Similarly, it creates informal waiver where actual waiver under existing doctrine does not exist.

Although the direct financial costs of compelled compliance here are relatively slight, that is not true in principle across the spectrum of likely applications. If Congress is able to defeat sovereign immunity simply by conferring a right on any state agency that is prospectively enforceable in federal court, the resulting costs could greatly exceed the cost from direct exactions from the state Treasury based upon traditional tort claims; something clearly forbidden by the Eleventh Amendment. VOPA's sweeping argument that *Verizon Maryland* automatically provides the rule of decision whenever a state agency sues state officials would create significant disruption in state governance. The power to control the relationship between quarreling agencies in its own

courts, with the resulting political accountability that that ensures, is an attribute of sovereignty which should not be lost through a mechanical application of an historically and doctrinally inapplicable fiction.

For all of these reasons, and those stated below, the Fourth Circuit correctly refused VOPA's invitation to extend the *Young* exception to suits between a state agency and state officials in their official capacity. The decision is particularly sound when it is remembered that the suit is founded upon a federal law enacted pursuant to the spending power that creates no individual right and directs no command to the officials being sued. In such a circumstance, the Federal Supremacy Clause interests are too weak to justify the extension of *Young* sought here, while Virginia's federalism interest is particularly strong.

III.

ARGUMENT

A. The Fourth Circuit Did Not Err In Conducting A Federalism Analysis.

Whether a state agency can sue state officials under *Young* is an issue of first impression in this Court. *Indiana Prot. & Advocacy Servs.*, 573 F.3d at 553 ("the Supreme Court has never used *Ex Parte Young* to let one arm of a state sue another."), *rev'd en*

banc, 603 F.3d 365.[7] The novel and unprecedented nature of the claim not only triggers the need for a federalism review, but it also foreshadows the conclusion to be reached. Simply put, this Court recognizes "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18). *See also Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (applying presumption); *Free Enterprise Fund*, 130 S. Ct. at 3159 ("'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.'") (citation omitted).

That a federalism review can be conducted without adopting a case-by-case balancing test of the sort rejected by the concurrence in *Coeur d'Alene Tribe*, 521 U.S. at 288-97, and by the Court in *Verizon Maryland*, 535 U.S. 635, is demonstrated by the fact that Part II-A of *Coeur d'Alene Tribe*, 521 U.S. at 267-70, is a majority opinion. It forbids "empty formalism" in applying *Young*, and instead counsels

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[7] The two examples offered by the United States (U.S. Amicus Br. at 24), *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 n.1 (1967), and *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441-42 (2009), are easily distinguished. Both were commenced and decided in state court before being appealed to this Court.

"that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." (*Id.* at 270). This in turn means that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." (*Id.*). To the contrary, "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." (*Id.*).

When it is remembered that "the Eleventh Amendment does not define the scope of the States' sovereign immunity," and instead "is but one particular exemplification of that immunity," *Fed. Maritime Comm'n*, 535 U.S. at 753, it becomes apparent why this Court is called upon to perform a federalism analysis whenever it encounters a proposal to widen the scope of State amenability to suit. *See, e.g.*, *Alden*, 527 U.S. 706; *Blackford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Ex parte New York*, 256 U.S. 490 (1921); *Smith v. Reeves*, 178 U.S. 436 (1900); *Hans*, 134 U.S. 1. Accordingly, the Fourth Circuit was correct in engaging in a federalism analysis.

B. All Considerations Relevant To A Federalism Analysis Favor Sovereign Immunity In This Case.

1. *Young* Does Not Apply by Its Own Logic.

The rule in *Young* was originally stated as this: "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity. . . ." 209 U.S. at 155-56. The rule was supported by these considerations:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior

> authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

(*Id.* at 159-60).

Where, as here, the individual defendants are not initiating any action, have no personal interest in the subject of the suit, and are being sued in their official capacity in federal court only for the purposes of challenging state policies and procedures (authorized by federal regulations) with respect to state property, the reasons for the *Young* exception are at their weakest. Indeed, as framed by *Young* itself, the triggering events justifying the exception are simply not present. (*Id.* at 159). ("It is simply an illegal act upon the part of a state official attempting by the use of the name of the State to enforce a legislative enactment . . . "). The only party coercively using the name of the State in this case is VOPA.

In the usual *Young* case, defendants are seeking to regulate or are affirmatively dealing with the plaintiff. The Virginia defendants in contrast have merely asserted a generally lawful privilege in refusing VOPA's demand. In any event, the fact that state papers are at issue makes the fiction that the state is not the true party in interest particularly thin.

It should also be noticed that VOPA did not even honor the fiction. Instead, VOPA sued defendants in their official capacities in the name of the Commonwealth of Virginia. *See Duckworth*, 780 F.2d at 649 (presumption that State is real party where official titles are used in complaint.). This is inconsistent with the rationale underlying *Young*.

The difference between action and inaction can rise to constitutional dimensions. For instance officers of the State cannot be ordered to perform contracts under *Young* because the real party in interest is then the State. *Louisiana v. Jumel*, 107 U.S. 711, 721-28 (1883). Indeed, "it is . . . well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against a State itself." *Pennoyer v. McConnaughly*, 140 U.S. 1, 9 (1891). There are two classes of contract cases. "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability" making the state the real party in interest. (*Id.* at 10). "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." (*Id.*).

The principle is larger than the field of specific performance of contracts. In *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899), this Court said: "There is a wide difference between a suit against individuals, holding

official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by **some positive act** a wrong or trespass, and a suit against officers of a State, merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State." (*Id.*) (emphasis added). This distinction between action and inaction was noticed early in our history and was considered important by commentators. 2 John Randolph Tucker, *The Constitution of the United States*, § 376 at 791 (Chicago: Callaghan & Co. 1899) (edited by Henry St. George Tucker) ("The decisions cited in the note hold that no suit against a State or its officers is allowed to compel any affirmative action against a State or its officers. The State cannot be so enforced; but where the State through its officers is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer.").

It is true that, in *Young*, the mere threat posed by the severe penalties of an unconstitutional act were deemed sufficient to support suit against the state officer having an intention to enforce them. *Young*, 209 U.S. at 148-49. *Fitts v. McGhee* was distinguished in *Young* on the ground that "[t]he officers in the *Fitts* case occupied the position of having no duty at all with

regard to the act, and could not properly be made parties to the suit for the reason stated." (*Id.* at 158).

Since *Young*, the ordinary case for its application has more or less fit the constitutional tort model. The State, through its officials, is acting or threatening to act unconstitutionally. *Young* may even extend to neglect if state actors are already dealing with someone through a benefit program, *Edelman v. Jordan*, 415 U.S. 651 (1974), or incarceration, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), or employment. *Russell v. Dunston*, 896 F.2d 664 (2d Cir. 1990). Indeed, in an ordinary *Young* action, any conflict between a State acting under state law and contrary federal law may trigger the exception in order to vindicate the Supremacy Clause. But it remains true that the suit is against the State and not the named officials when "'the essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, **or interfere with the public administration**." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citation omitted and emphasis added). At least one commentator has recently maintained that the distinction between action and inaction is the overarching explanation of *Young* jurisprudence. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 491, 557-58 (2001) (". . . the Court's holdings in this area form a pattern. In a suit against an officer, a plea of sovereign immunity is disallowed when the immunity

would operate offensively, but not when it would operate defensively.").

This is not an ordinary *Young* suit and nothing requires that the exception be extended to this case. *Pennhurst*, 465 U.S. at 114 n.25 ("the authority-stripping theory of *Young* is a fiction that has been narrowly construed."). Instead, because the categorical rule sought by VOPA—that every state agency seeking prospective relief to vindicate a federal right can always sue its parent State through its officers—would interfere with the public administration, the extension sought by VOPA should be refused. This case, far from being an ordinary application of *Young*, looks more like a failed abrogation case such as *Seminole Tribe*. As was the case there, this Court should refuse to extend *Young*.

2. Virginia Has a Sovereign Interest in Resolving Conflicts between the State and Its Agencies or Political Subdivisions without Interference from the Federal Courts.

Virginia has a long recognized sovereign interest in resolving conflicts between the State and its agencies or political subdivisions, without interference from the federal courts. As the Fourth Circuit has noted:

> A State has near plenary authority to allocate governmental responsibilities among its political subdivisions. This power to

> structure its internal government is among those reserved to the Commonwealth by the Tenth Amendment. Needless to say, the federal court must in turn respect a State's division of responsibility.

Bacon v. City of Richmond, 475 F.3d 633, 641 (4th Cir. 2007) (citation omitted). "It would be an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine" issues that are "uniquely an exercise of state sovereignty." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996).

Here, a State has been financially encouraged to create VOPA, but no abrogation or waiver of immunity has occurred under the law of the case because the findings of no abrogation and no waiver made by both the district court and the Fourth Circuit have not been appealed. Furthermore, Congress's requirement that VOPA have the power to sue is satisfied by the traditional state writ of mandamus. In these circumstances, Virginia's sovereign interests are undiminished.

The recognition of a sovereign interest with respect to subdivisions applies with even greater logical force when an agency of the State attempts to set up "some superior power with authority" over the State. 3 Blackstone, *supra*. Hence, subdivision cases are instructive. "[A] political subdivision, 'created by the state for the better ordering of government, has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator.'" *Ysursa v. Pocatello Education Ass'n*, 129 S. Ct. 1093, 1101 (2009) (citations omitted). There are "few greater intrusions on state sovereignty than requiring a state to respond, in federal court, to a claim . . . by one of its own counties." *Harris v. Angelina County, Texas*, 31 F.3d 331, 340 (5th Cir. 1994). Furthermore, federal courts should not "adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 998 (6th Cir. 1987). Even where there is a constitutional claim, a political subdivision, because of its character and identity, has been found to lack the capacity to sue the State that created it. *Bd. of Levee Comm'rs v. Huls*, 852 F.2d 140, 142 (5th Cir. 1988).[8] While these decisions involve political subdivisions rather than agencies or institutions, the reasoning "extends logically to other creatures of the

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[8] Although the Fifth Circuit described the issue as a "state agency" suing the State, *Huls* actually involved a political subdivision suing the State. As the Fifth Circuit later explained:

> *Huls* did *not* hold that the levee board could not sue the State of Louisiana because the levee district was an arm of the state. Instead, *Huls* held that the levee board was a creature or agency of the state, and, like other creatures of a state—including municipalities—the levee board could not prevent the state, in the exercise of its police power, from revoking a prior delegation of authority.

Vogt v. Bd. of Comm'rs of Orleans Levee Dist., 294 F.3d 684, 691 (5th Cir. 2002).

state such as state universities." *United States v. Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986). Thus, VOPA's proposed suit in federal court against the State that created it offends traditional notions of state sovereignty.

3. VOPA's Historical Examples Are Inapposite while the True Historical Record Favors the Virginia Defendants.

English municipal corporations at the time of the founding were not subdivisions of the royal government. They were corporations with the right to sue and be sued—not different in kind from the two English universities, insurance companies and the East India Company, *see* 1 Steward Kyd, *A Treatise on the Law of Corporations*, 28-29 (London 1793) (Google Books); although those municipal corporations that were boroughs had a right of parliamentary representation. As chartered corporations against whom a writ of *quo warranto* would lie for forfeiture of their charters, they were more like private parties than states. Miller, *supra* (English governments sometimes moved against charters for partisan political reasons). These circumstances render VOPA's citation of *Corporation of London v. Corporation of Liverpool*, (1796) 145 Eng. Rep. 1024 (L.R. Exch.); *Mayor of the City of London v. Mayor of the Borough of Lynn Regis*, (1796) 126 Eng. Rep. 1026, 1040 (H.L.); *County of Worcester*

v. Town of Evesholm, (1686) 90 Eng. Rep. 116 (K.B.) (Pet'r's Br. at 46, 46 n.9), unremarkable;[9] although it might also be observed that the first two cases in the series post-date the adoption of the Eleventh Amendment. Similarly, *R. v. The Lords Commissioners of the Treasury*, 7 L.R.Q.B. 387 (1872) (WL 14191) (*id.* at 47), comes from too late in the nineteenth century to have American precedential value.

While it is true that English sheriffs were executive officers of the crown (Pet'r's Br. at 45) (citing *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 793-94 (1997)), VOPA's use of *Darby v. Foxley*, (1615) 81 Eng. Rep. 370, 1 Rol. Rep. 118 (K.B.) (Pet'r's Br. at 46), is not instructive. As a source cited by VOPA makes clear, suits for damages against individual officers at this time did not seek payment from the king, and in any event, could be removed by the crown into the privy council if it desired to protect the officer. Louis L. Jaffe, *Suits Against Governments and Officers; Sovereign Immunity*, 77 HARV. L. REV. 1, 9-10 (1963). *County of Salop v. County of Stafford*, (1665) 82 Eng. Rep. 1051 (K.B.), was an action prosecuted without apparent objection with the design of ascertaining which taxing authority had physical jurisdiction over a manor. It is unlikely that

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[9] *Cf. Bank of the United States v. The Planters Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824) ("The State does not, by becoming a corporator, identify itself with the corporation.").

Foxley or *County of Salop* were much in the minds of the founders being only short notices in law French.

The true state of English law is that, by 1786, there was no generally effective judicial remedy against the crown. First, "[i]t bears remembering that the common law had nothing akin to modern public-law litigation, which holds the government accountable for broad constitutional violations." Paul F. Figley and Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1238 n.252 (2009). With respect to contract, "Blackstone argued that contract actions succeeded not as a matter of legal right but only because 'no wise prince will ever refuse to stand to a lawful contract.'" (*Id.* at 1214). Nor was there liability in tort. (*Id.* at 1214-15).

As a consequence, "nearly all of the cases in which the Crown was amenable to suit involved 'real actions.'" (*Id.* at 1215). But there were special reasons to permit suits of that character, and they were so hedged about with limitations that they amounted only to suits by consent. Prior to the abolition of the last incidents of feudal tenure in 1660, the crown had an interest in actions real, "for otherwise it might be impossible to determine proper feudal relationships." (*Id.*). The "more generally useful remedy" in real actions—the petition of right—required consent. (*Id.* at 1214). Although the *monstrans de droit* did not, it was subject to tacit consent because the crown could always abate it through the writ of *rege inconsulto*. (*Id.*). *See Black's Law Dictionary* at 1282 (6th ed. 1990)

("a writ issued by the sovereign to the judges, not to proceed in a cause which may prejudice the Crown until advised.").

During the eighteenth century, parliament acquired complete control over state finances through the appropriation power. It also put the crown on a legally or practically inalienable allowance. Figley and Tidmarsh, *supra*, at 1234-38. These developments led Lord Mansfield to conclude in *Macbeath v. Haldimand*, (1786) 1 T.R. 172, 99 Eng. Rep. 1036 (K.B.), that money judgments against the king could have no practical benefit. Although Lord Mansfield recognized that the House of Lords had ruled in 1700 in the *Banker's Case* that suit could be brought to enforce annuities backed by the king's private revenue, he also observed that the ruling had done the bankers no good. The only satisfaction they ever received was by way of parliamentary appropriation. (*Id.* at 1234-38). In recognition of the practical limitations on the *Banker's Case*, the eighteenth century is barren of "common-law sovereign immunity decisions." (*Id.*).

Not only are VOPA's English examples unconvincing on their own terms, they are inapposite for an overarching doctrinal reason as well. The crown's immunity served to protect "the dignity and . . . sovereignty of the royal person" from the "setting up" of "some superior power with authority to call him to account." 3 Blackstone at 254-55. When the doctrine of sovereign immunity was transferred to America, it became an incident of state sovereignty.

Chisholm, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting). Because sovereign immunity became a federalism issue early in our history, examples from Britian's unitary system of government are not on point. VOPA itself recognizes the problem. (Pet'r's Br. at 47) ("Of course because England lacked this Nation's federalist system, [the English] cases never had to address questions regarding in which sovereign's court system such a suit should be heard."). For the English examples to have salience, they would have to involve suits against the crown in the courts of some other sovereign. However, that would have been a violation of the customary law of nations outside of the context of a federal union.

Having recognized the issue, one would expect VOPA to turn to American examples. Its failure to do so cannot hide the clear expectation of the founding generation that states would not be generally subject to suit in federal court. Alexander Hamilton observed in Federalist No. 81 that "'[i]t is inherent in the nature of sovereignty not to be amenable to suit of an individual *without its consent*.'" *Alden*, 527 U.S. at 716. At the Virginia ratifying convention, James Madison argued that Article III would not operate against a state unless it "'should condescend to be a party.'" (*Id.* at 717) (citation omitted). In this he was supported by John Marshall: "'It is not rational to suppose, that the sovereign power shall be dragged before a court.'" (*Id.* at 718) (citation omitted). This indeed was the settled law of nations. Caleb Nelson, *Sovereign Immunity As a Doctrine of Personal*

Jurisdiction, 115 HARV. L. REV. 1559, 1574-76 (2002) (citing *Coolbaugh v. Comm.*, 4 Yeates 493, 494 (Pa. 1808) (no sovereign power amenable to suits either in its own courts or those of a foreign country without its consent)). That the States continued to enjoy this immunity under the Articles of Confederation was never in doubt. Nelson, *supra*, at 1577-79.

It is, of course, true that anti-federalists worried that this law of nations immunity might not survive ratification. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 265-68 (1985) (Brennan, J., dissenting). The emphatic and immediate rejection of *Chisholm* by the whole country through the immediate adoption of the Eleventh Amendment is the proof that Americans believed that law of nations immunity had not been generally abrogated.[10] Hence, the State is deemed immune except in those circumstances which this Court has identified. As the law now stands, "States are subject to suit by both their sister States and the United States" and where *Young* applies. *Nevada v. Hall*, 440 U.S. 410, 420 n.19 (1979).

It is apparent in light of the historical record that permitting one part of the State to sue the State through its officials **in federal court** in order to produce a judgment binding on the State itself would

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[10] *See* Nelson, 115 HARV. L. REV. at 1558-59 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)), for the proposition that, when law of nations immunity exists, disputes otherwise within the jurisdictional grant of Article III cease to be justiciable cases and controversies).

have been regarded as "anomalous or unheard of when the constitution was adopted." VOPA's argument to the contrary (Pet'r's Br. at 45-48) is wholly implausible.

4. Acceptance of VOPA's Position Would Create Abrogation and Waiver without the Existing Limits and Safeguards.

VOPA's argument that *Verizon Maryland* should be mechanically applied to permit agency-on-agency suits would effectively eliminate existing doctrine for abrogation and waiver in such cases. Although Congress may abrogate the sovereign immunity of States under certain circumstances, it may not do so based upon powers enumerated in Article I. *Bd. of Trustees v. Garrett*, 531 U.S. 356. With respect to abrogation, as with other sovereign immunity issues, "this Court has long 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (citing *Seminole Tribe*, 517 U.S. at 54). To accomplish abrogation, Congress must do two things. First it must "'mak[e] its intention unmistakenly clear in the language of the statute.'" (*Id.* at 73) (citations omitted). Then, Congress must have the power to legislate under § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 72-73. The requirement for abrogating sovereignty before a State can be sued in federal court applies not only to claims for money damages, but also to claims for equitable

relief not within the ambit of *Young*. *Seminole Tribe*, 517 at U.S. at 58, 74-75.[11]

Here, no one thinks that Congress intended to abrogate Virginia's sovereign immunity directly and that issue is not even before the Court given VOPA's decision not to appeal that portion of the decision. (Pet. at 9a-10a) (With respect to abrogation "Congress has not even tried."). But VOPA's sweeping interpretation of *Young* and *Verizon Maryland* would create the same result anytime Congress confers a right exercisable by a state agency. *See Fed. Maritime Comm'n*, 535 U.S. at 761 ("it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, *see Seminole Tribe*, 517 U.S. at 72, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.").

The results VOPA advocates might be tolerable in this case if Congress had satisfied the standards for waiver. But both the district court and the Fourth Circuit expressly held that there has been no waiver (Pet. at 11a), and those rulings are not part of this appeal. (Pet. at 13a) ("We hold only that Congress has not provided a sufficiently explicit statement to produce a waiver here.").

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[11] The argument by the Rhode Island Child Advocate that sovereign immunity does not apply in equity is clearly mistaken under *Seminole Tribe* (Br. of R.I. Child Advocate at 12).

Congress has conferred an uncountable number of rights and interests on state agencies receiving federal funds. Permitting every state agency to sue in federal court to resolve policy disputes with the State would mean that a State, contrary to existing doctrine, would lose its sovereign immunity through its mere receipt of federal funds. Despite the obvious potential to channel a torrent of state agency litigation into federal court, *see* Part III (B)(6) below, the Law Professor Amici and R.I. Child Advocate actually argue for this version of informal waiver. (Law Prof. Br. at 4, 18-19); (R.I. Child Advocate Br. at 17).

5. The Indignity of a State Being Sued by One of Its Own Agencies Is at Least as Serious as Other Dignity Interests Giving Rise to State Sovereign Immunity.

VOPA recognizes that sovereign immunity protects a State's dignity interests and not merely its fisc. (Pet'r's Br. at 26). VOPA contends, however, that those dignity interests are fully accommodated by the rule against suing the State *eo nomine* and by the rule against suing over a question of state law. (*Id.*). Less generously, the AARP *et al.*, put the word dignity in scare quotes. (AARP Br. at 5, 7-8, 10-11, 13).

"The preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities."

Fed. Maritime Comm'n, 535 U.S. at 760. The indignity suffered by the Commonwealth of Virginia in being hailed into federal court by VOPA to subject it, without its consent, to the enforcement of an administrative scheme is at least as great as the indignity that Florida would have suffered from having the same thing done in *Seminole Tribe*. Indeed, the harms are indistinguishable because they are the same.

6. Federal Supremacy Clause Interests Are Too Well Protected by Other Means and State Federalism Interests Are Too Strong to Justify Extending *Young* to Cover This Case.

Young is a legal fiction created by this Court to vindicate the Supremacy Clause. Nothing in this case compels this Court to extend that fiction where the usual Supremacy Clause interests are not implicated in the usual way because no individual right has been created and no specific command has issued from the federal government. Instead, the statutes impose conditions that must be met to entitle a system to receive federal funding.

VOPA characterizes this dispute as one implicating "'civil liberties.'" (Pet'r's Br. at 54-55). But PAIMI, 42 U.S.C. §§ 18001 *et seq.*, and the D.D. Act, 42 U.S.C. §§ 15001 *et seq.*, as they relate to VOPA's investigative powers, create no "rights" at all in the usual sense. They are exercises of Congress's

spending power under which States may obtain federal funding if they meet certain conditions. One of those conditions is that VOPA have the authority to "pursue administrative, legal and other appropriate remedies" in the discharge of its responsibilities. 42 U.S.C. § 10805(a)(1)(B); *id.* § 15043(a)(2)(A)(i). To implement this authority, Virginia law authorizes VOPA to engage special counsel to represent it in litigation. *Va. Code Ann.* § 2.2-510(5) (2008). There is no specific statutory requirement that VOPA have the capacity to sue a state agency in federal as opposed to state court. There is no statutory treatment of sovereign immunity.[12] In short, nothing in the statute purports to abrogate sovereign immunity or require Virginia to waive sovereign immunity as a condition for the receipt of federal funds. *Cf.* 42 U.S.C. § 2000d-7. To receive federal funds under 42 U.S.C. § 10803, 42 U.S.C. § 10805(a)(4) requires VOPA to have access to certain records. "45 C.F.R. § 1386.22(b) [does specify] that VOPA is authorized to have access" to certain records (J.A. at 18) (Compl. ¶ 40), and 42 U.S.C. § 15043(a)(2)(I)(J) also provides that for a system to receive funds it must have access to certain records.

Virginia does not argue that federal laws supported by the spending power cannot create individual rights which are capable of being

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[12] 42 U.S.C. § 15044(b) does provide: "Nothing in this sub chapter shall preclude a system from bringing a suit on behalf of **individuals** with developmental disabilities against a state, or an agency or instrumentality of a state."

vindicated in a garden variety *Young* proceeding. What Virginia does argue is that permitting a state agency to sue state officers in federal court to compel them to adopt its view of what federal funding conditions require is a novel application of *Young* that is not necessary to preserve any strong Supremacy Clause interest. Indeed, the statutes themselves contain federal oversight, reporting, and evaluation procedures intended to protect the federal interest. 42 U.S.C. §§ 10803, 10805(a)(5), 10805(b); 42 U.S.C. § 15043(a)(2)(C). There is also a regulatory regime through which the federal government can decide to withhold all or a part of funds due a State if it does not satisfy the requirements of the federal scheme. 42 C.F.R. § 51.4 (incorporating by reference as applicable to PAIMI grants the standards of 45 C.F.R. Part 92); 45 C.F.R. § 1386.81 (D.D. Act) (providing for hearings under 42 U.S.C. § 6042, currently codified at 42 U.S.C. § 15043).

This Court has refused to extend *Young* where Congress has provided other remedies. *Seminole Tribe*, 517 U.S. at 73-76. *See also Seminole Tribe of Fla.*, 11 F.3d at 1028-29 (*Young* inapplicable when a suit is really against the State and a suit is really against State when law commands no official by name or title but rather commands the State *qua* State.). Here, the federal oversight of the funds is quite elaborate. First, before disbursing any funds, the Secretary must be satisfied that State's system meets the requirements of federal law. 42 U.S.C. § 10803 (PAIMI Act); 42 U.S.C. § 15042(a)(1)

(D.D. Act). Grantees must submit annual performance reports. 45 C.F.R. § 92.40. Once granted, funds are subject to remedies for noncompliance. 45 C.F.R. § 92.43(a). These remedies include temporarily withholding cash payments pending correction of the deficiency, or suspending or terminating the current award for the grantee's or subgrantee's program in whole or in part. The agency must provide the grantee with an opportunity for a hearing, appeal or an administrative proceeding. 45 C.F.R. § 92.43(b). The proper conclusion to be drawn from the availability of these remedies was stated in *Seminole Tribe* in these terms:

> Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has

> prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

517 U.S. at 74.

Here, in addition to the administrative remedies available to the Secretary, followed by potential judicial review under the APA, VOPA has an adequate judicial remedy through mandamus in state court to reach the documents it seeks. Despite arguments to the contrary, if VOPA's claim is valid on the merits, the state mandamus procedure would offer prompt and sure relief. In Virginia, such proceedings are resolved in a matter of months. Nor is the writ uncertain where it is properly available. "A mandamus is always granted to compel the performance of some duty which has not been done." *Bd. of Supervisors of Amherst Cty. v. Combs*, 169 S.E. 589, 593 (Va. 1933) (citation omitted). "'Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law.'" *In re: Horan*, 634 S.E.2d 675, 676 (Va. 2006) (quoting *Richlands Med. Ass'n v. Commonwealth*, 337 S.E.2d 737, 739 (Va. 1985)); *accord Griffin v. Bd. of Supervisors*, 124 S.E.2d 227, 233 (Va. 1962). "A ministerial act is an act that one performs in obedience to a legal mandate and in a prescribed manner, without regard to his own judgment as to the propriety of the act to be done."

City of Richmond v. Hayes, 184 S.E.2d 784, 785 (Va. 1971) (citing *Dovel v. Bertram*, 34 S.E.2d 369, 370 (Va. 1945)); *accord In re: Horan*, 634 S.E.2d at 676; *Richlands Med. Ass'n*, 337 S.E.2d at 739. Furthermore, the Virginia courts are "presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). *See also Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (no intrinsic reason why state adjudication of federal law would be less competent.) (citation omitted).

Permitting VOPA's suit would have potentially dire consequences for the States and for federal court dockets. All States presumably have independent agencies. Even agencies subject to some political control through the appointment process sometimes have the capability of being independent because they have fixed, staggered terms. Permitting such agencies to sue state officials in federal court whenever they can claim some federal administrative or procedural interest under a spending act would be a heavy burden on state sovereignty and would flood the federal district courts with disputes that, under principles of comity, they should have no institutional desire to hear.

CONCLUSION

Wherefore, the opinion of the Fourth Circuit ought to be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 09-529

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER,

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

On the question presented, respondents offer no reason why a suit brought by an independent state agency against state officials to vindicate federal rights does not naturally fall within the scope of *Ex parte Young*, 209 U.S. 123 (1908).

There is no dispute that this is a justiciable controversy involving the federal rights of petitioner. None of the branches of the Commonwealth of Virginia can definitely resolve this controversy. Indeed, respondents agree that if this controversy were resolved by a state court, it could be reviewed by this Court because it involves an issue of federal law. Resp. Br. 8; Br. in Opp. 25. Because the action arises under federal law, does not name the State, and does not seek money damages from the state treasury, it does not implicate any of the rationales underlying Eleventh Amendment immunity.

Respondents also ignore that their voluntary decision to constitute petitioner as a state agency (rather than as a corporation or a political subdivision) mitigates any burden on their sovereignty. Instead, they raise the specter that reversal of the Fourth Circuit would allow multiple agencies to bring suits like this one. But neither respondents nor their amici point to even one example of another federal statute that can confer federal rights on a state agency against another state agency.

I. *EX PARTE YOUNG* IS AVAILABLE TO PUBLIC ENTITIES LIKE PETITIONER TO BRING STATE OFFICIALS INTO COMPLIANCE WITH FEDERAL LAW

A. This Case Falls Squarely Within The Scope Of *Ex parte Young*

Petitioner's suit satisfies the straightforward inquiry adopted by this Court. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ. concurring in part and concurring in judgment) and citing *id.* at 298-299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting)).

Moreover, this suit is justified by the same rationale that underlies all *Ex parte Young* cases: to provide a federal forum to vindicate federal rights. Respondents' efforts to suggest otherwise draw into question *Ex parte Young* itself.

1. Ex parte Young *is a necessary corollary to the Eleventh Amendment*

At points, respondents appear to question whether state officials may *ever* be sued in federal court for prospective relief. Resp. Br. 28-32. Respondents

suggest that, because such relief binds the State itself, it is contrary to the purpose of the Eleventh Amendment. *Ibid.* But suits against state officials are "indispensable to the establishment of constitutional government and the rule of law." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 314 (6th ed. 2002); *see also* Law Professors Amicus Br. 7, 12.

Ex parte Young provides the primary "means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." *Alden v. Maine*, 527 U.S. 706, 757 (1999). This Court consistently has explained that *Ex parte Young* is "necessary" so that federal courts can vindicate the Supremacy Clause. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); *see also Alden*, 527 U.S. at 748 (describing *Ex parte Young* as forming "an essential part of our sovereign immunity doctrine").

Respondents attempt to diminish *Ex parte Young* by describing it as a "fiction" or a "formalism." Resp. Br. 9-10, 16-17. But the *Ex parte Young* doctrine is rooted in the same history on which respondents rely. The historic tradition that shaped the doctrine of sovereign immunity also sanctioned suits for relief against state officials. As respondents themselves previously explained, "[a]t the time of the Framing, English common law allowed private parties to obtain injunctive relief against royal officials who were violating the law." Br. in Opp. 23-24 (emphasis omitted).

2. Ex parte Young *is not equivalent to abrogation or waiver of the State's immunity*

Contrary to respondent's assertion, the power of federal courts to enjoin state officials to bring them into compliance with federal law is not equivalent to abrogation or waiver of immunity. Resp. Br. 14, 23, 24, 32-34, 36.

Abrogation or waiver would permit retroactive monetary relief. Such relief is not available under *Ex parte Young*. *See Alden*, 527 U.S. at 712, 757; *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

Further, abrogation or waiver would allow the suit to be brought directly against the State or its agencies—thus impugning the dignity of the State. Opening Br. 35. In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), this Court recognized that suits directly against the State affected its dignity in a way that suits against its officials did not. In that case, the United States contended that claims in administrative proceedings for injunctive relief should be allowed against the State in its own name, because the *Ex parte Young* distinction between suits against the State and the state's officials was not critical to maintaining sovereign immunity. This Court firmly rejected that argument. It held that allowing the State to be named as a party would not "afford the States the dignity and respect due sovereign entities." *Id.* at 769. The Court reiterated that no relief is

available against the State in its own name absent abrogation. *Ibid.*

By contrast, this Court repeatedly has permitted *Ex parte Young* suits even when Congress lacked the power to abrogate sovereign immunity. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (even though Americans with Disabilities Act did not validly abrogate immunity, it "can be enforced * * * in actions for injunctive relief under *Ex parte Young*"); *Alden*, 527 U.S. at 757 (same under Fair Labor Standards Act).[1]

3. *The relief sought here is permissible under* Ex parte Young *even if it is characterized as redressing inaction*

While the remedies available under *Ex parte Young* are different than those available under abrogation or waiver, they are not as limited as respondents contend.

a. Respondents argue *Ex parte Young* is limited to prohibiting state officials from taking actions that would violate federal law, and does not allow a court to mandate that state officials take action to comply

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[1] Respondents assert without explanation (Resp. Br. 11, 20) that petitioner did not honor the dignitary interest of the State in its pleading. But it did. No state agency is sued. All of the defendants are sued only in their official capacities, as this Court has long sanctioned. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Prout v. Starr*, 188 U.S. 537, 543-544 (1903).

with federal law. Resp. Br. 10, 12, 18-23. Respondents are incorrect.

Many of this Court's modern *Ex parte Young* cases would need to be overruled if respondents' argument were accepted. In *Frew*, this Court unanimously relied on *Ex parte Young* to hold that a federal court could enforce a consent decree that "implement[ed] the Medicaid statute in a highly detailed way, requiring the state officials *to take some steps* that the statute does not specifically require." 540 U.S. at 439 (emphasis added); *see also Quern v. Jordan*, 440 U.S. 332 (1979) (order requiring state official to send notice to members of plaintiff class fell within scope of *Ex parte Young*); *Milliken v. Bradley*, 433 U.S. 267 (1977) (order requiring state officials to pay one-half of programs needed to restore schoolchildren to position they would have enjoyed absent constitutional violations fell within scope of *Ex parte Young*).

Respondents' theory would apparently bar federal courts from compelling state officials to provide minorities and women access to state universities. *Compare Meredith v. Fair*, 305 F.2d 343 (5th Cir.) (Wisdom, J.) (ordering members of Board of Trustees to admit James Meredith to the University of Mississippi), stay denied, 83 S. Ct. 10 (1962). And respondents' theory would suggest that federal courts could not require state officials to provide reasonable accommodations for applicants for state employment in wheelchairs (as required by the Americans with Disabilities Act) or to pay prospectively minimum

wages (as required by the FLSA), because those orders would require affirmative acts on the part of state officials. *Compare Garrett*, 531 U.S. at 374 n.9; *Alden*, 527 U.S. at 757.

Contrary to respondents' assertion (Resp. Br. 20-21), cases prior to *Ex parte Young* were not so limited. They expressly authorized injunctive relief or mandamus to require state officials to take certain actions. *See Rolston v. Crittenden*, 120 U.S. 390 (1887) (ordering state officer to assign liens to plaintiffs); *Virginia Coupon Cases*, 114 U.S. 270 (1885) (ordering return of personal property in possession of state official). In *Board of Liquidation v. McComb*, 92 U.S. 531 (1875), the Court explained that "the writs of *mandamus* and injunction are somewhat correlative to each other" because "if the officer plead the authority of an unconstitutional law for the non-performance or violation of his [federal] duty, [immunity] will not prevent the issuing of the writ." *Id.* at 541; *see also Rolston*, 120 U.S. at 411 (suit not barred by Eleventh Amendment because "the suit is to get a state officer to do what a statute requires of him").[2]

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[2] Thus, respondents are correct when they acknowledge that "mandamus is the traditional exception to sovereign immunity." Resp. Br. 14 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). But it is an exception for exactly the same reason as in *Ex parte Young*—because the relief is sought against the official and not against the government itself. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 888 (1970).

Ex parte Young itself followed *McComb* and rejected the idea that a state official's refusal to act could not be remedied. This Court stated that a federal court can "direct affirmative action where the officer * * * refuses or neglects to take such action" required by federal law. 209 U.S. at 158 (citing *McComb*, 92 U.S. at 541). The Court has continued to reject the action/inaction rule proposed by respondents. *See Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (in a suit by a territory against a state official, holding that the power of federal courts to "enjoin unconstitutional action by state officials" includes the power to "compel[] the performance of such duties" that are imposed by federal law). Instead, the measure of the constitutional remedy is the prospective/retroactive standard of *Edelman v. Jordan*, 415 U.S. 651 (1974) most recently affirmed in *Verizon*.

Moreover, a distinction between action and inaction would be difficult to apply in many cases, as shown by respondents' suggestion that the supposed distinction is potentially inapplicable "if state actors are already dealing with someone." Resp. Br. 22. Petitioner is already in an on-going relationship with respondents and regularly receives access to records (although not the type of records at issue in this case).

In addition, petitioner's demand can be characterized as seeking inaction. Indeed, one of petitioner's requests for relief is an order enjoining respondents from "interfering, in any way, with VOPA's access to records." J.A. 22. Petitioner seeks

access to records, *i.e.*, to inspect records in respondents' possession and copy them (with petitioner paying to offset any duplicating costs). *See* 42 C.F.R. § 51.41(e); 45 C.F.R. § 1386.22(d). The only thing preventing petitioner from inspecting and copying records is that respondents will not stand aside.

b. Respondents also suggest (without elaboration) that because petitioner is seeking access to documents, *Ex parte Young* is inapplicable. Resp. Br. 11, 19. But petitioner does not want to divest respondents of title or even possession of the documents. It simply wants to inspect and copy them.

If the Eleventh Amendment barred a court from ordering inspection and copying of records in the possession of state officials, then *all* discovery of documents in any civil actions brought against state officials (in their official or individual capacities) would be prohibited by the Eleventh Amendment. *Compare* Fed. R. Civ. P. 34(a)(1) (requiring a party to "produce and permit the requesting party or its representative to inspect, copy, test, or sample [any designated documents or electronically stored information] in the responding party's possession, custody, or control"). That simply has never been the law. *See Barnes v. Black*, 544 F.3d 807, 809 (7th Cir. 2008) (Posner, J.); *In re Missouri Dep't of Natural Res.*, 105 F.3d 434, 436 (8th Cir. 1997).

4. The voluntary nature of participation by States in federal Spending Clause statutes weighs in favor of authorizing Ex parte Young *actions*

The fact that the two statutes that authorize petitioner's access to respondents' records are exercises of the Spending Clause authority does not diminish the role of *Ex parte Young*. Respondents' contrary argument (Resp. Br. 11, 15, 35-36) would require this Court to overrule decisions expressly applying *Ex parte Young* to Spending Clause statutes. *See, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (Medicaid Act); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Aid to the Aged, Blind, and Disabled Act).

The Court also would have to overrule numerous cases holding that, once a recipient voluntarily accepts federal funds, the Supremacy Clause requires state officials to obey the statutory conditions attached to those funds, and any contrary state laws are preempted. *See, e.g.*, *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (per curiam); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Blum v. Bacon*, 457 U.S. 132 (1982); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 29 (1981) (citing *Carleson v. Remillard*, 406 U.S. 598 (1972)).

If anything, the fact that the statutes here are Spending Clause statutes diminishes any burden on the dignity of the State from having its officials sued for prospective relief. The State is free to negate any injunction by electing not to receive additional federal funds. "Although a court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money, the recipient has the option of withdrawing and hence terminating the prospective force of the injunction." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (opinion of White, J.); *see Pennhurst*, 451 U.S. at 29, 30 n.23. Thus, the State has the last say about whether and for how long its officials must comply prospectively with a federal court's order.

B. The Nature Of Petitioner As A State Agency Does Not Alter The *Ex parte Young* Balance

1. Respondents experience no additional fiscal or dignitary burden due to the public-entity status of the plaintiff

Respondents articulate no additional fiscal or dignitary burden they experience due to the public-entity status of the plaintiff, and there is none.

As to the state treasury, they assert (Resp. Br. 14) that the cost of prospectively complying with federal laws that *might* in the future be enforceable by state agencies *could* exceed the costs of potential

tort damages claims. Even setting aside the speculative nature of that assertion, the argument is misplaced. Sovereign immunity protects state treasuries from damages awards, not the costs of complying with federal law. Thus, this Court has affirmed suits under *Ex parte Young* that have required large expenditures going forward to redress violations of federal law. *See Milliken*, 433 U.S. at 289-290. Likewise, *Ex parte Young* would not permit a damage award, no matter how nominal.

Respondents assert an affront to their dignity in only a single paragraph. They assert that the "indignity" they will experience is "at least as great as the indignity that Florida would have experienced" in *Seminole Tribe*. Resp. Br. 35. But *Seminole Tribe* involved a suit against the State in its own name. As discussed above, *see* page 4, *supra*, that is a critical distinction with regard to the State's dignity interests.

The dispute between petitioner and respondents is not, as respondents claim (Resp. Br. 34), a dispute over "policy" that is properly resolved within the sovereign. Congress gave petitioner a federal right to access certain records in federal statutes that respondents have never suggested are unconstitutional. Accepting petitioner's contentions as true, respondents are violating that federal right. If petitioner is correct, the Supremacy Clause itself bars respondents from adopting any other course than to provide access. "The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is

acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Respondents assert (Resp. Br. 14-15, 23) that suits by state agencies against state officials in federal court would entail a significant disruption in state government. But they do not explain—nor could they—why such suits would be more disruptive than suits that they acknowledge are permitted, i.e., federal suits by individuals, corporations, political subdivisions, Indian Tribes, the federal government, and foreign nations; and state suits by state agencies.

If anything, petitioner's status as an independent state agency lessens any dignitary burden. Because both petitioner and respondents' state agency are arms of the sovereign state and both are subject to federal law, federal court is an appropriate forum to resolve their federal controversy. *Cf. United States v. Texas*, 143 U.S. 621, 646 (1892).

To be clear, the conferral of this federal right on an agency of the Commonwealth of Virginia was not itself a unilateral decision made by the federal government and imposed on the States. Indeed, there is a serious Tenth Amendment question whether Congress could unilaterally grant federal rights to a state agency. *Cf. Printz v. United States*, 521 U.S. 898 (1997). Under the statutes at issue here, Congress provided the State an incentive, in the form of federal funds, to establish an independent Protection and Advocacy System. But Congress did not require (or even encourage) that the entity be part of the State

government. It is the Commonwealth of Virginia that elected to establish petitioner as a state agency (a choice made by a small minority of States). Virginia could have received the federal funds even if it had designated a private entity as its Protection and Advocacy System (like the vast majority of States). And if it had done so, the Eleventh Amendment would not bar this suit, as respondents have previously acknowledged. *See* page 23, *infra*.

Further, respondents' arguments are premised (Resp. Br. 23, 34, 40) on the speculative assertion that, if the Fourth Circuit is reversed, *Ex parte Young* suits by state agencies against other state agencies will become common. But respondents and their amici offer no examples of any other federal statutes that vest in a state agency rights sufficient to provide standing to bring federal suits against other state officials.[3] Congress enacted the Developmental

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[3] Amici Indiana et al. point to Title VII of the Civil Rights Act and suggest (at 13-14) that it authorizes state agencies to enforce federal law. But, in fact, Title VII simply defers federal enforcement until a state agency considers complaints under state laws. *See* 42 U.S.C. § 2000e-5(c) (when a State has a "law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice * * *, no charge may be filed [with the federal EEOC] * * * before the expiration of sixty days after proceedings have been commenced under the State or local law * * *."). The Connecticut law cited by amici authorizes a state commission to sue other state agencies, but other provisions make clear the state commission only addresses violations of state law. *See, e.g.*, Conn. Gen. Stat. § 46a-51(8) (defining "discriminatory practice" as a violation of state law).

Disabilities Act and the PAIMI Act decades ago because States were not addressing abuse and neglect in their own institutions of a particularly vulnerable population. Opening Br. 2-8; National Disability Rights Network Amicus Br. 9-21. These are important statutes, but they are unique in their design: they address a problem in which the mistreatment of vulnerable individuals occurred outside public scrutiny and the individuals directly affected could not advocate for themselves.

2. *Public-entity suits are supported by historical practice*

Respondents do not dispute that, in English courts prior to this Nation's Founding, various political entities created by the King were able to sue the King's agents and each other. Opening Br. 45-48.

Respondents suggest (Resp. Br. 13, 30) that this history is irrelevant because these are simply examples of a sovereign's officials being sued in the courts of that sovereign. But this Court in *Hans* (like Justice Iredell in *Chisholm*) looked to English precedents in determining the breadth of a State's immunity in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 12 (1890); *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 435 (1793) (Iredell, J.). The same analysis is appropriate here and demonstrates that this suit is consistent with historical practice.

Second, respondents argue (Resp. Br. 12-13, 26-27) that some of the historical examples are inapposite because cities were then viewed as equivalent to

private corporations. But status as a "corporation" does not explain the distinction between those who could sue and those who could not. Some of the examples involved suits by counties, which were never incorporated entities but were merely auxiliaries of the Crown. *See Barnes v. District of Columbia*, 91 U.S. 540, 552 (1875); 1 John F. Dillon, *The Law of Municipal Corporations* § 10a, at 96-97 (New York, James Cockcroft & Co. 2d ed. 1873); *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.).

3. Cases involving suits brought by political subdivisions support applying Ex parte Young

Notably, although respondents describe (Resp. Br. 7-8) the Fourth Circuit's reliance on this Court's so-called *Williams/Trenton* line of cases, respondents do not rely on them. This is presumably because none of those cases involved a suit against a State or state officials. Opening Br. 48-49.

Instead, respondents seek support (Resp. Br. 23-26) in dismissals by lower courts of suits brought by political subdivisions against state officials. But all but one of them did so on the ground that the dispute involved no federal claim (either because the federal Constitution did not provide the political subdivision a right or because the claim arose only under state law). Those holdings are thus inapposite, as petitioner here seeks to enforce a federal statutory right.

In the one case cited by respondents that addressed the Eleventh Amendment—*Harris v. Angelina Cnty., Tex.*, 31 F.3d 331 (5th Cir. 1994)—a county filed a third-party action against the State and its officials seeking "monetary and injunctive relief." *Id.* at 336-337. The court simply concluded that "we are not inclined to extend [*Ex parte Young*] to cover the County's claim for contribution here." *Id.* at 339. The court's reasoning, like that of respondents and the court below, elided the doctrine of abrogation into the *Ex parte Young* analysis. *Id.* at 340.

Moreover, other courts of appeals have authorized suits by political subdivisions to proceed when federal claims were at issue. *See Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), cert. denied, 444 U.S. 827 (1979); *Allegheny Cnty. Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 n.3, 1175 n.5 (3d Cir. 1984); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), cert. denied, 526 U.S. 1068 (1999). These decisions recognize that *bona fide* federal claims by governmental entities against state officials will be rare. But when such claims exist, federal courts should be open to hear them. This Court's cases reflect the same conclusion. Opening Br. 49 (citing, inter alia, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)).

C. *Coeur d'Alene* Offers No Solace To Respondents

1. Suits for prospective relief against state officials are not subject to case-by-case balancing

Respondents acknowledge (Resp. Br. 16) that a majority of the Court in *Coeur d'Alene* rejected a "case-by-case balancing test." They nonetheless urge (Resp. Br. 9-10, 16-17) that a "federalism analysis" is appropriate. They then point (Resp. Br. 18-40) to six "considerations relevant to a federalism analysis," some of which relate to the nature of the plaintiff, some of which relate to the relief sought, and some of which relate to the particular statutes being enforced. That is case-by-case balancing by another name.

The majority in *Coeur d'Alene* examined the extraordinary relief sought in that case and concluded that it fell outside the prospective relief permitted by *Ex parte Young* because it would divest the State of regulatory jurisdiction and title to property. Opening Br. 50-51; *see* AARP et al. Amicus Br. 8-13. In contrast, this suit—seeking access to records—shares none of those characteristics.

2. Remedies in state court are both irrelevant and inadequate

Respondents are unclear about the role state court remedies play in their *Ex parte Young* analysis. Under *Alden*, the constitutional protection of state sovereign immunity applies to federal causes of actions against States in state courts just as it applies

to federal courts. *See* 527 U.S. at 757. Thus, if respondents were correct that *Ex parte Young* is not available for this suit in federal court, it is unclear under *Alden* whether it would be available in state court. *Cf. id.* at 749 (suggesting that requiring a state court to hear a federal action against the State might "be even more offensive to state sovereignty" than authorizing such suits in federal court). That might lead to the federal right being unenforceable by petitioner in any forum. "If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a State to its courts, * * * it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution * * * ." *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908).

a. Respondents attempt to avoid the consequences of their argument by asserting (Resp. Br. 14, 39-40) that the Virginia Supreme Court will provide petitioner "prompt and sure" relief on its federal claim through a state cause of action—an original action for mandamus. But respondents offer no rationale or authority for the proposition that the availability of a state cause of action is relevant to whether *Ex parte Young* is available.

Previously, in their brief in opposition in this Court, respondents relied solely on Justice Kennedy's plurality opinion in *Coeur d'Alene*. Br. in Opp. 28. But, as explained in the opening brief, a majority of Justices in *Coeur d'Alene* rejected that plurality view, and *Verizon* subsequently quoted and cited those

Justices' opinions as articulating the governing standard. Opening Br. 52-53.

Indeed, measuring federal jurisdiction based on the relief available in state court would be contrary to the intent of Congress. In response to *Ex parte Young*, Congress enacted two statutes that limited federal court jurisdiction in particular areas where Congress thought suits in federal court against state officials were particularly disruptive. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 n.28 (1981). Those statutes bar federal litigation raising federal claims only if the State provides a "plain, speedy and efficient remedy." 28 U.S.C. §§ 1341 (Tax Injunction Act), 1342 (Johnson Act regarding public utility rates). Notably, Congress did not extend that requirement to *all* suits under *Ex parte Young*. Congress thus made clear that it did not intend plaintiffs to have to make such a showing about state remedies to seek relief in federal court in *Ex parte Young* cases outside the areas of taxes and rate setting.

This conclusion is consistent with decisions of this Court recognizing a strong interest in having federal courts resolve questions of federal law. Opening Br. 56; AARP et al. Amicus Br. 14-16. This is not to suggest that such federal court jurisdiction is exclusive, but rather Congress allowed either plaintiffs or defendants to have a case arising under federal law heard in federal court. *See* 28 U.S.C. §§ 1331 (district court jurisdiction), 1441 (removal of cases by defendants); *cf. Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (State cannot prohibit or otherwise

discourage corporation from resorting to federal court in lieu of state court). Respondents offer no reason why this choice should not be available in this case.

b. In any event, an original action for mandamus in the Virginia Supreme Court is not an adequate substitute for a federal district court action.

First, interim relief is not available—the Virginia Supreme Court cannot offer anything equivalent to a preliminary injunction or an order to preserve records during the pendency of the litigation. Opening Br. 53-54. That alone makes the state remedy inadequate. *See Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 109-110 (1939) (no "plain, speedy, or efficient" remedy in state court for purposes of Johnson Act where it was unclear whether state court possessed authority to grant preliminary injunctive relief).

Respondents do not dispute the unavailability of interim relief. Rather, they suggest the lack of such interim relief is unimportant because original proceedings for mandamus "are resolved in a matter of months." Resp. Br. 39. But the federal statutes make clear that Congress intended a Protection and Advocacy System to gain access to the records in a period measured in days, not months. U.S. Br. 28.

Second, the Virginia Supreme Court has no mechanism for factfinding. Opening Br. 54. Respondents do not address, and thus apparently concede, this infirmity.

Finally, respondents assert that mandamus "is always granted to compel the performance of some duty which has not been done." Resp. Br. 39 (quoting *Board of Supervisors of Amherst Cnty. v. Combs*, 169 S.E. 589, 593 (Va. 1933)). When read in context, that case simply identifies when mandamus is appropriate (always to compel a duty and never to undo a past action). It does not call into question more recent Virginia Supreme Court cases that characterize the decision whether to issue the writ as based on "judicial discretion." Opening Br. 53 (quoting *Gannon v. State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992)); *see also In re Commonwealth of Virginia*, 677 S.E.2d 236, 242-243 (Va. 2009) (refusing the grant of mandamus because it would not promote "substantial justice").

II. RESPONDENTS' INVOCATION OF SUPPOSED CONGRESSIONAL LIMITS TO *EX PARTE YOUNG* IN THE STATUTES INVOKED BY PETITIONER ARE BELATED AND MISGUIDED

For the first time in this long-running dispute, respondents argue that Congress in the Developmental Disabilities Act and the PAIMI Act intended to prohibit plaintiffs from relying on *Ex parte Young*. Resp. Br. 11, 37-39. Respondents' new argument is contrary to their arguments below and in their brief in opposition. And it is incorrect.

a. In the Fourth Circuit, respondents repeatedly asserted that the status of petitioner as a state

agency was the only reason *Ex parte Young* did not apply. In their opening brief, respondents conceded: "If VOPA were a non-profit entity rather than a state agency, there would be no sovereign immunity issue." Resp. C.A. Opening Br. 26.

In respondents' reply brief below, they likewise acknowledged: "If the office for protection and advocacy is an independent non-profit entity, then it is not a sovereign entity and, thus, there is no barrier to the application of the *Ex parte Young* doctrine." Resp. C.A. Reply Br. 7. The Fourth Circuit agreed with respondents and held that petitioner cannot rely on *Ex parte Young*, "because VOPA is a state agency." Pet. App. 28a.

And in respondents' brief in opposition in this Court, they sought to distinguish federal cases brought against state officials by other Protection and Advocacy Systems as involving "suits by protection and advocacy entities organizes as *private* entities, not as state agencies." Br. in Opp. 13. Having failed to press this statutory argument (as opposed to their constitutional argument) at any point previously, it is waived. *See Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 & n.14 (2010); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2525 n.2 (2010).

b. In any event, respondents are simply wrong. In *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), this Court explained that a statute must reflect an "intent to foreclose jurisdiction under *Ex parte Young*." *Id.* at 647.

The statute in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), manifested such an intent by authorizing private suit directly against the State and by imposing remedial limits on prospective relief that were inconsistent with *Ex parte Young*.

In *Verizon*, by contrast, there was an express private cause of action (47 U.S.C. § 252(e)(6)) for challenging some state conduct in federal court, but the Court assumed that cause of action was not applicable to the suit before it. 535 U.S. at 642-644. The Court held that any additional cause of action could be enforced through *Ex parte Young*. The fact that Section 252(e)(6) made "some other actions by the state commissions reviewable in federal court" did not "eliminate jurisdiction" for a federal court to review commission actions that were not covered. *Id.* at 643 (emphasis removed). The congressional creation of the other cause of action did "not without more 'impose upon the States a liability that is significantly more limited than would be the liability imposed upon the state officers under *Ex parte Young*.'" *Id.* at 647-648.

In this case, likewise, Congress gave no textual indication that it sought to limit the relief available to a Protection and Advocacy System. To the contrary, both acts authorize the Protection and Advocacy System to "pursue administrative, legal, and other appropriate remedies." 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i). None of the courts of appeals that have heard cases brought by Protection and Advocacy Systems against state officials has ever suggested

that Congress intended to bar such suits. Opening Br. 36 n.7, 40.

Respondents suggest (Resp. Br. 11, 37-39) that the federal government could enforce compliance with the duty to provide access to records by withholding federal funds from Virginia if respondents did not comply. But respondents' funds are not at risk. Instead, the statutes "provide[] for remedies *only against a protection and advocacy system*" if it fails to comply with its obligations under federal law. *Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 379 n.12 (7th Cir. 2010) (*"IPAS"*) (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131).[1]

Under respondents' view, Congress intended to bar petitioner from using *Ex parte Young* to assure access to records, even though petitioner is the entity at risk of fund reduction if respondents do not provide such access. There is nothing in the statutes that reflects such an unlikely congressional intent, and the governing regulations state otherwise. *See* 45

[1] Arguably, if the federal government withholds money from a Protection and Advocacy System, that may also trigger a withholding of federal funds under Part B of the Developmental Disabilities Act, 42 U.S.C. §§ 15021-15029. *See* 42 U.S.C. § 15043(a); 45 C.F.R. § 1386.21(a). Part B pays for a Council on Developmental Disabilities in each State that prepares a state five year plan identifying the most pressing needs of people with developmental disabilities in that State and then works to implement that plan. In fiscal year 2011, Virginia will receive approximately $1.5 million in Part B funds.

C.F.R. § 1386.25 (providing that federal funds "may be used to pay the otherwise allowable costs incurred by a Protection and Advocacy System in bringing lawsuits in its own right * * * to obtain access to records").

CONCLUSION

For the foregoing reasons and those in the opening brief, the judgment should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

Supreme Court, U.S.
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No. 09-529

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

The Respondents, pursuant to Rule 15(8), submit the following response to the brief filed by the Solicitor General of the United States.

I. THE CONFLICT AMONG THE CIRCUITS IS NARROW AND INCONSEQUENTIAL.

Since this Court invited the Solicitor General to express the views of the United States, the Seventh Circuit rendered a decision explicitly disagreeing with the Fourth Circuit's decision. *See Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin.*, ___ F.3d ___, No. 08-3183 (7th Cir. Apr. 22, 2010) (*en banc*). Although there is a conflict between the Seventh Circuit and the Fourth Circuit, this Court should decline review. This is so for three reasons.

First, the conflict is narrow. Only two Circuits—the Seventh and the Fourth—have addressed the ability of a protection and advocacy entity that is organized as a state agency to sue state officials of the same State in federal court. The Court should allow the issue to develop further in the lower courts to determine whether this is actually a recurring issue.

Second, the issue is unlikely to recur. Only eight States have protection and advocacy entities organized as state agencies. Moreover, the Respondents are unaware of any similar litigation currently in the

lower federal courts. This Court should not review an issue that rarely occurs.[1]

Third, because the Petitioner is the only protection and advocacy agency organized as a state agency in the Fourth Circuit, the impact of the lower court's decision is limited to the one entity—the Petitioner. Quite simply, this Court should not grant review in a case where only the Petitioner is affected—and that effect is minimal because the Petitioner can seek relief in state court.

II. THE PETITIONER MAY PURSUE ITS CLAIMS IN STATE COURT

As explained in more detail on pages 25-29 of the *Brief in Opposition*, the Petitioner can pursue its claims in the Virginia state courts.[2] The Petitioner concedes that it can pursue its claims in state court. Thus, the practical effect of the Fourth Circuit decision is not to bar the Petitioner's claims, but simply to dictate *where* the suit is heard. This Court should not grant review of a decision that simply decides in a narrow class of cases whether the Petitioner litigates in state or federal court.

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[1] When VOPA acts as counsel for a private litigant, rather than on its own behalf, the issue presented in this case is not implicated.

[2] It is undisputed that the Supreme Court of Virginia may hear the Petitioner's claims in an original action. It is an open question whether a state trial court of general jurisdiction may hear the matter.

III. IF THIS COURT DOES NOT DENY REVIEW, IT SHOULD HOLD THE PETITION PENDING RESOLUTION OF *SOSSAMON V. TEXAS* AND INDIANA'S FORTHCOMING PETITION.

If this Court does not deny review, it should hold the Petition pending resolution of *Sossamon v. Texas*, No. 08-1438, *cert. granted*, 130 S. Ct. ___ (May 24, 2010) and/or Indiana's forthcoming Petition seeking review of *Indiana Protection and Advocacy Services*.[3]

Sossamon requires this Court to decide if the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, allows recovery of damages and, if so, whether sovereign immunity has been waived for damages claims against the States. Because nothing in the statutory text of RLUIPA mentions damages or a waiver of sovereign immunity for damages claims, *Madison v. Virginia*, 474 F.3d 118, 131-32 (4th Cir. 2006), this Court must decide if a Spending Clause statute can impose conditions that are not clearly and unambiguously articulated in the statutory text. *Cf. Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'").

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[3] Indiana has informed the Seventh Circuit that it intends to seek certiorari and has asked the Seventh Circuit to stay the mandate pending resolution of its forthcoming Petition.

If this Court, consistent with *Arlington Central*, holds that a Spending Clause statute may not impose conditions that are not clearly and unambiguously articulated in the statutory text, then it will be effectively rejecting the United States' position, that, as a condition of receiving federal funds, Virginia agreed that its agency may sue Virginia officials in federal court. *See United States Brief* 15-17. In those circumstances, a denial of the Petition would be appropriate. Conversely, if this Court holds that a Spending Clause statute may impose conditions that are only implied by the statutory text, then this Court will be effectively endorsing the United States position. In that situation, a grant, vacate, and remand would be appropriate.

Alternatively, if this Court wishes to decide this narrow issue before deciding *Sossamon*, it should hold the Petition and grant Indiana's forthcoming Petition for review of *Indiana Protection and Advocacy Services*. The Seventh Circuit case is a superior vehicle to resolve the issue of whether a protection and advocacy entity that is organized as a state agency may sue state officials of the same State in federal court. The Seventh Circuit decision clearly presents the issue of whether Congress may use the Spending Clause to empower a state agency to sue state officials of the same State. *See Indiana Protection and Advocacy Services*, ___ F.3d at ___, No. 08-3183, Slip Op. at 9-14. The Fourth Circuit only decided this issue by implication.

CONCLUSION

For the reasons stated above and in the Brief in Opposition, this Court should **DENY** the Petition for Certiorari. Alternatively, this Court should **HOLD** the Petition pending *Sossamon* and/or Indiana's forthcoming Petition.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-529

In the Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES W. STEWART, III, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Petitioner, an independent state agency, brought this action against state officials for prospective injunctive relief to remedy ongoing violations of the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq.* The question presented is whether the Eleventh Amendment bars this suit, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because petitioner is a state agency.

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In the Supreme Court of the United States

No. 09-529

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES W. STEWART, III, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a protection and advocacy system established as an independent state agency pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq.*, may invoke *Ex parte Young*, 209 U.S. 123 (1908), in order to seek prospective injunctive relief in federal court to remedy ongoing violations of those statutes. The Secretary of Health and Human Services administers those Acts. The United States has a substantial interest in

ensuring that all protection and advocacy systems are able both to effectively enforce the rights established by the Acts and to fulfill their statutory function of protecting the rights of persons with developmental disabilities and mental illness. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari.

STATEMENT

1. a. In 1975, Congress established the first of several grant programs that provide States funding to create protection and advocacy (P&A) systems to protect individuals with developmental disabilities or mental illness from abuse and neglect. The law was enacted in response to reports of severe abuse and neglect at a New York state institution for the mentally disabled. See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6001 *et seq.* (1976) (repealed 2000); S. Rep. No. 1297, 93d Cong., 2d Sess. 59 (1974) (*1974 Senate Report*). In 2000, Congress reauthorized the statute as the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), Pub. L. No. 106-402, 114 Stat. 1677 (42 U.S.C. 15001 *et seq.*), finding that "individuals with developmental disabilities are at greater risk than the general population of abuse [or] neglect," 42 U.S.C. 15001(a)(5), and are in need of improved services and assistance, 42 U.S.C. 15001(a)(6) and (12).

Under the DD Act, a State may receive federal funding to improve "community services and opportunities," including medical care, job training, and social supports,

available to persons with developmental disabilities. 42 U.S.C. 15023(a), 15024. If the State wishes to receive this funding, it must create and maintain a P&A system to "protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. 15043(a). The P&A system then receives separate federal funding, which is paid directly to the system. 42 U.S.C. 15042(a) and (b).

Similar concerns about abuse and neglect of mentally ill individuals in state-run psychiatric facilities led to the enactment of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. 10801 *et seq.*, in 1986. See S. Rep. No. 109, 99th Cong., 1st Sess. 1-3 (1985) (*PAIMI Senate Report*). The PAIMI Act authorized additional funding for P&A systems established pursuant to the DD Act, and expanded their mission to encompass the protection of and advocacy for individuals with mental illness. 42 U.S.C. 10802(2), 10803, 10827. The PAIMI Act was reauthorized most recently in 2000. See Youth Drug and Mental Health Services Act, Pub. L. No. 106-310, Div. B, § 3206(f), 114 Stat. 1195. Congress has also enacted several other statutes that provide additional funding for P&A systems.[1]

b. Under the DD Act and the PAIMI Act, a P&A system "shall * * * have the authority to investigate incidents of abuse and neglect * * * if the incidents

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[1] See 29 U.S.C. 794e (funding for P&A systems to serve persons with disabilities not eligible under previously established P&A programs); 29 U.S.C. 3004 (funding pertaining to obtaining assistive technologies); 42 U.S.C. 300d-53 (2006 & Supp. II 2008) (funding to serve individuals with traumatic brain injury); 42 U.S.C. 1320b-21 (funding to assist beneficiaries of Social Security with employment); 42 U.S.C. 15461 (funding to assist individuals with disabilities in the electoral process).

are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). To ensure that such investigations are effective, the statutes provide that P&A systems "shall * * * have" a broad right of access to "all records" that are relevant to an investigation in enumerated circumstances.[2] 42 U.S.C. 10805(a)(4), 15043(a)(2)(I) and (J). Because P&A systems often investigate ongoing abuse, the DD Act entitles them to prompt access: institutions ordinarily must produce requested records within three business days of a P&A system's request, and must provide "immediate access" to records in cases involving the death of, or immediate danger to, a disabled individual. 42 U.S.C. 10543(a)(2)(J). "[R]ecords" are defined to include any records created by an institution's staff or an investigating agency, including those that "describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents." 42 U.S.C. 10806(b)(3)(A); see 42 U.S.C. 15043(c). The PAIMI Act specifies that these federal rights of access exist even if state law would otherwise "prohibit [the system] from obtaining access to the records of individuals with men-

[2] P&A systems are also entitled to obtain access to disabled individuals receiving services, 42 U.S.C. 15043(a)(2)(H), and access to facilities that provide care to mentally ill individuals, 42 U.S.C. 10805(a)(3).

tal illness in accordance with" federal law.[3] 42 U.S.C. 10806(b)(2)(C).

The DD and PAIMI Acts provide that a P&A system "shall * * * have the authority * * * to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" individuals with disabilities or mental illness. 42 U.S.C. 15043(a)(2)(A)(i); see 42 U.S.C. 10805(a)(1)(B). In addition to pursuing remedies on their own behalf, P&A systems also may "pursue administrative, legal, and other remedies on behalf of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(C); see 42 U.S.C. 15044(b).

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[3] The Department of Health and Human Services (HHS), which administers the DD and PAIMI programs, see 42 U.S.C. 10802(6), 10803, 10826, 15002(26), 15004, has promulgated regulations defining records as including certain evaluative materials, but stating that "nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees." 42 C.F.R. 51.41(c)(4); 45 C.F.R. 1386.22(e)(1). A number of courts of appeals have ruled that notwithstanding HHS's regulation, the PAIMI Act preempts state peer-review privileges. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 382-383 (7th Cir. 2010) (en banc), petition for cert. pending, No. 10-131 (filed July 21, 2010); *Protection & Advocacy for Persons with Disabilities, Conn.* v. *Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs.* v. *Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023-1024 (8th Cir. 2006); *Center for Legal Advocacy* v. *Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.). The question whether a P&A system is entitled to obtain access to peer-review records when such records are privileged under state law is currently under regulatory review, see, *e.g.*, 73 Fed. Reg. 19,708-19,709, 19,716, 19,731-19,732 (2008), and is not before this Court.

A participating State has the option to designate either a state agency or a private nonprofit entity to serve as its P&A system. See 42 U.S.C. 10805(c)(1)(B), 15044(a). Under either alternative, the P&A system must be independent of any state agency that provides treatment or services, 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), to ensure that the system will be effective in investigating abuse and neglect at state-run (as well as private) facilities. See *PAIMI Senate Report* 2. Whether the P&A system is public or private, the DD Act provides that the Governor may not appoint more than one-third of the system's governing board, 42 U.S.C. 15044(a)(2), and the Act also restricts the State's ability to impose funding and hiring restrictions on the system, 42 U.S.C. 10543(a)(2)(K). In addition, once a State establishes its P&A system, it may change the public or private nature of the system only by redesignating the system for "good cause." 42 U.S.C. 15043(a)(4).

c. The Commonwealth of Virginia has elected to participate in these federal spending programs. Virginia chose to place its P&A system in an independent state agency—the petitioner in this case—known as the Virginia Office of Protection and Advocacy. See Va. Code Ann. § 51.5-39.2(A) (2009). Petitioner is independent of the Attorney General of Virginia and has authority "to investigate complaints relating to abuse and neglect or other violation of the rights of persons with disabilities in proceedings under state or federal law, and to initiate any proceedings to secure the rights of such persons." *Ibid.*

2. Petitioner filed this action in the United States District Court for the Eastern District of Virginia, seeking records in connection with its investigation into the

deaths of two individuals and injuries to a third that occurred while the individuals were residents of institutions operated by the Commonwealth. Pet. 9-11; J.A. 11, 13-17. The defendants—respondents in this Court—are three state officials. J.A. 12-13.

Petitioner alleged that in 2006, two patients at state-run institutions for individuals with mental illness or developmental disabilities had died and a third had been injured, leading petitioner to open investigations into whether those events were the result of abuse or neglect. J.A. 13-16. Petitioner requested that respondents provide records relating to any risk management or mortality reviews conducted with respect to the deaths and injuries. J.A. 14-16. Respondents, according to petitioner, refused to produce the records on the basis of an asserted peer-review privilege. J.A. 16. Petitioner alleged that the DD and PAIMI Acts entitled it to receive the records, notwithstanding any state-law privilege that might otherwise apply. J.A. 18-20. Petitioner sought a declaration that respondents' "refusal to provide the records requested * * * is in violation of the DD and PAIMI Acts"; an injunction requiring respondents to provide access to "records mandated by the DD and PAIMI Acts"; and an injunction prohibiting respondents "from interfering, in any way, with [petitioner's] access to records." J.A. 21-22.

Respondents moved to dismiss, contending, as relevant here, that they were immune from suit under the Eleventh Amendment. Pet. App. 30a-31a, 35a. The district court denied respondents' motion, explaining that because petitioner sought declaratory and injunctive relief against state officials in their official capacities under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment did not bar the suit. In determining wheth-

er *Ex parte Young* applies, the district court stated, "a court 'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Pet. App. 41a (quoting *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (*Verizon*)). The court also rejected respondents' contention that because petitioner is a state agency, "special sovereignty interests" counseled against allowing the suit to proceed under *Ex parte Young*. The court reasoned that "[i]t is the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests," and petitioner's suit properly sought prospective relief to enforce federal law. *Id.* at 44a-45a.

3. Respondents appealed the district court's sovereign immunity ruling under the collateral order doctrine, Pet. App. 6a; see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the court of appeals reversed and remanded. The court acknowledged that under the "straightforward inquiry" set out in *Verizon*, 535 U.S. at 645, and followed by the district court, *Ex parte Young* would permit petitioner's suit. Pet. App. 13a-14a. Indeed, the court noted, respondents conceded that petitioner's suit could proceed under *Ex parte Young* if it were brought by a private P&A system or an individual. *Id.* at 16a-17a.

Nonetheless, the court concluded, relying on *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" may be barred by sovereign immunity if the suit implicates "special sovereignty interests." Pet. App. 16a. In the court's view, petitioner's status as a state agency rendered the suit an "intramural contest" that

"encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff." *Id.* at 17a. The court stated that it found support for that proposition in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), which held that an action under *Ex parte Young* is not available to enforce state law, and in *Alden* v. *Maine*, 527 U.S. 706 (1999), which held that Congress lacks the power under the Commerce Clause to abrogate state sovereign immunity in state courts. The court also found support for that proposition in decisions holding that state political subdivisions do not have constitutional rights that may be enforced against the State, Pet. App. 22a (citing *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907)). The court therefore held that "the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court." *Id.* at 17a. A state P&A system, the court suggested, could still seek to enforce the DD and PAIMI Acts against state officials in state court, to the extent permitted by state law. *Id.* at 25a.

4. Petitioner filed a petition for rehearing and rehearing en banc. The United States filed a brief as *amicus curiae* in support of petitioner. Pet. App. 82a-97a. The court of appeals denied rehearing. *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

Petitioner may invoke *Ex parte Young*, 209 U.S. 123 (1908), to enforce the federal-law obligations of state officials who operate facilities for developmentally disabled and mentally ill individuals under the DD and PAIMI Acts. This Court has held that in determining whether a plaintiff's suit against state officials is per-

missible under *Ex parte Young*, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (brackets in original). Petitioner's suit indisputably satisfies these requirements. Petitioner alleges that the defendant officials are violating federal law by refusing to provide petitioner access to certain patient records, and seeks declaratory and injunctive relief to remedy that violation. No more is required to allow a suit to proceed under *Ex parte Young*. Indeed, respondents and the court of appeals agreed that this suit would be permissible under *Ex parte Young* if it were brought by a private P&A system.

Nonetheless, the court of appeals held that petitioner could not invoke *Ex parte Young* and therefore barred this suit from proceeding. In the court of appeals' view, the ability of a plaintiff to invoke *Ex parte Young* depends on a case-by-case examination of possible "special sovereignty interests." The court found that petitioner's status as a state agency gave rise to such an interest. Pet. App. 16a (citing *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997)). Both propositions are mistaken. This Court reaffirmed in *Verizon* that a case-by-case balancing of state and federal interests has no place in the *Ex parte Young* analysis. And even if "special sovereignty interests" might in some circumstances justify disallowing a suit under *Ex parte Young*, petitioner's state-agency status does not engender any such interest.

Petitioner's suit is not, as the court of appeals suggested, an "intramural" dispute between two arms of the Commonwealth that threatens the Commonwealth's "sovereign dignity," Pet. App. 18a. Under the DD and

PAIMI Acts, a P&A system has the authority to "pursue legal, administrative, and other appropriate remedies" to ensure protection of persons with developmental disabilities or mental illness. 42 U.S.C. 15043(a)(2)(A)(i); see 42 U.S.C. 10805(a)(1)(B). The Acts expressly provide, moreover, that the P&A system must be independent of other arms of state government. 42 U.S.C. 10805(a)(2), 15043(a)(2)(G). Here, the Commonwealth established petitioner specifically to enforce the federal requirements of the DD and PAIMI Acts against both state and private facilities, and made petitioner independent of state control, as is required by the Acts to ensure P&A systems' ability to take adversarial positions against state entities. When petitioner sues a state official, then, it is implementing the federal policy to which the Commonwealth voluntarily assented by participating in the federal programs—not engaging in an intrastate political dispute. And, in any event, respondents cannot contend that petitioner's status as a state agency transforms an otherwise permissible *Ex parte Young* suit into an affront to its sovereignty when that status is the result of the Commonwealth's own decision, in opting to accept federal funds, to create a public P&A rather than a private one.

The court of appeals' decision threatens to unravel the calibrated enforcement scheme that Congress contemplated in the DD and PAIMI Acts. The result will inevitably be to compromise the ability of public P&A systems to protect vulnerable individuals from abusive and neglectful practices that can result in injury and death. To facilitate the P&A systems' protective functions, Congress gave them the authority to investigate individual suspected instances of abuse and neglect, and to obtain expeditious access to records, facilities

and patients. Without the ability to invoke *Ex parte Young* to enforce those rights in federal court, petitioner would effectively be left without an adequate remedy in any forum: the only potential state-court remedy, mandamus relief from the Virginia Supreme Court, is available only in extraordinary circumstances and does not permit interim relief. Public P&A systems would thus not be able to enforce their rights against state facilities, whereas private P&A systems would be, resulting in a two-tiered and unequal enforcement system. Congress did not intend such an odd result, and nothing in this Court's Eleventh Amendment jurisprudence requires it.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER MAY NOT BRING AN *EX PARTE YOUNG* SUIT AGAINST STATE OFFICIALS

A. Petitioner's Suit Satisfies The Requirements Of *Ex Parte Young*

1. In *Ex parte Young*, this Court held that a federal court may adjudicate a suit against a state officer to enjoin official actions that violate federal law, even if the State would be immune under the Eleventh Amendment if the same suit were brought against the State itself. 209 U.S. at 159-160; see, *e.g.*, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in the judgment). This longstanding rule is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (*Pennhurst*) (internal quotation marks and citation omitted). By ensuring the

availability of "[r]emedies designed to end a continuing violation of federal law," *Ex parte Young* "gives life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

At the same time, the need to vindicate the supremacy of federal law "must be accommodated to the constitutional immunity of the States" under the Eleventh Amendment. *Pennhurst*, 465 U.S. at 105. The Court has therefore identified three characteristics that, in order to address Eleventh Amendment concerns, must be present before a plaintiff may invoke the rule of *Ex parte Young*.

First, the suit must be brought against a state official, rather than the State itself. The Eleventh Amendment does not permit the State to be sued without its consent. See *Pennhurst*, 465 U.S. at 98. *Ex parte Young* is grounded in the premise that a state officer who violates federal law is "stripped of his official or representative character and * * * subjected in his person to the consequences of his individual conduct." 209 U.S. at 160; *Pennhurst*, 465 U.S. at 104-105.

Second, the suit must allege a violation of federal law. *Pennhurst*, 465 U.S. at 105-106. A plaintiff may not invoke *Ex parte Young* to enforce state law against state officials, because such a suit would intrude on state sovereignty without furthering any "federal interest in assuring the supremacy of [federal] law." *Green*, 474 U.S. at 68. When a suit does not seek to vindicate the authority of federal law, the "entire basis for the doctrine of *Young* * * * disappears." *Pennhurst*, 465 U.S. at 106.

Third, the suit must seek only prospective relief for an ongoing violation. While prospective remedies to end continuing violations of federal law are "necessary" to

protect federal rights, "compensatory or deterrence interests" are insufficient to overcome the force of the Eleventh Amendment. *Green*, 474 U.S. at 68-69. Permitting retroactive relief, moreover, "would effectively eliminate the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. Therefore, a plaintiff may not invoke *Ex parte Young* to sue state officials for money damages to be paid out of the state treasury, see *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), for divestiture of state property interests, see *Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment), or for any relief that, though facially characterized as prospective, would in substance "impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," *Verizon*, 535 U.S. at 646 (internal quotation marks, citation and emphasis omitted); see *Edelman*, 415 U.S. at 666-667 (equitable restitution "in practice resemble[d] a money judgment payable out of the state treasury").

Applying these principles, this Court reaffirmed in *Verizon* that a suit that complies with these three limitations may "avoid[] an Eleventh Amendment bar to suit" under *Ex parte Young*. 535 U.S. at 645. In determining whether a plaintiff may invoke *Ex parte Young*, then, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Ibid.* (brackets in original) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).

2. Petitioner's complaint satisfies the "straightforward inquiry" set out in *Verizon*. Petitioner names as defendants three state officials in their official capaci-

ties. J.A. 12-13; see *Verizon*, 535 U.S. at 645. Petitioner alleges that respondents are committing an ongoing violation of federal law by refusing to provide petitioner with access to patient records to which petitioner maintains it is entitled under the DD and PAIMI Acts. J.A. 18-21. And petitioner seeks purely prospective relief: a declaration that respondents' refusal to provide the requested records violates federal law, and an injunction directing respondents to allow access to the records. J.A. 21; Pet. 11. *Ex parte Young* requires no more. See *Verizon*, 535 U.S. at 646.

Indeed, respondents and the court of appeals acknowledged that examining the four corners of the complaint for the determinative characteristics identified in *Verizon* would lead to the conclusion that petitioner may avail itself of *Ex parte Young*. Thus, respondents "concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." Pet. App. 16a-17a.

B. Petitioner's Status As A State Agency Does Not Alter Its Ability To Invoke *Ex Parte Young*

Even though petitioner's suit satisfies the three conditions set forth in *Verizon*, the court of appeals nonetheless held that petitioner could not avail itself of *Ex parte Young*. The court reasoned that because petitioner is a state agency, "this case differs from *Ex parte Young* in a critical respect," Pet. App. 14a, rendering *Verizon*'s "straightforward inquiry" inapplicable. That conclusion was erroneous.

1. The court of appeals relied primarily on *Coeur d'Alene Tribe*, which it read as requiring a case-by-case analysis of whether a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" implicates "special

sovereignty interests" that outweigh the importance of ensuring prospective compliance with federal law. Pet. App. 16a (quoting *Coeur d'Alene Tribe*, 521 U.S. at 281). But this Court has not, in the century since the doctrine was first announced, engrafted a "special sovereignty interests" inquiry onto the traditional *Ex parte Young* analysis.

In *Coeur d'Alene Tribe*, the Tribe and some of its members brought suit against Idaho state officials, claiming a beneficial interest in certain submerged lands within the State. 521 U.S. at 265. The plaintiffs sought declaratory and injunctive relief establishing the Tribe's exclusive right to use and enjoyment of the lands and the invalidity of all state statutes and regulations as applied to the lands. *Ibid.* This Court acknowledged that the plaintiff sought prospective relief for an alleged ongoing violation of federal law. *Id.* at 281. Nonetheless, it held that *Ex parte Young* did not permit the suit because the relief sought by the Tribe was unusually "far-reaching and invasive." *Id.* at 282, 287 (requested relief was "fully as intrusive as almost any conceivable retroactive levy upon" state funds). The Court concluded that not only did the suit seek "the functional equivalent of quiet title," but also it sought a determination that "a vast reach of lands and waters long deemed by the States to be an integral part of its territory" were "not even within the regulatory jurisdiction of the State." *Id.* at 282. The suit thus differed from the "typical *Young* action" in aiming to "eliminate altogether the State's regulatory power" over sovereign lands rather than "bring[ing] the State's regulatory scheme into compliance with federal law." *Id.* at 289, 291 (O'Connor, J., concurring in part and concurring in the judgment).

In this case, as the court of appeals acknowledged, the relief petitioner seeks does not implicate *Coeur d'Alene Tribe*'s holding: the requested injunction requiring state officials to provide access to records does not seek divestiture of state lands or property interests, or the elimination of regulatory authority. See Pet. App. 16a-17a; see also *Verizon*, 535 U.S. at 648 (Kennedy, J., concurring) (distinguishing Verizon's suit for injunctive relief from *Coeur d'Alene Tribe* on the ground that *Coeur d'Alene Tribe* involved a situation in which the plaintiffs sought "to divest a State of sovereignty over territory within its boundaries"). The court of appeals instead relied on the analysis undertaken in another portion of the *Coeur d'Alene Tribe* opinion, authored by Justice Kennedy and joined only by Chief Justice Rehnquist. Those Justices would have adopted a case-by-case approach to the application of *Ex parte Young*, guided by the presence or absence of "special sovereignty interests." See *Coeur d'Alene Tribe*, 521 U.S. at 270-280. In relying on that portion of the opinion, the court of appeals overlooked the fact that seven other Justices reaffirmed that the inquiry governing whether an *Ex parte Young* suit may proceed against state officials is "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 298-299 (Souter, J., dissenting); see also *Verizon*, 535 U.S. at 648-649 (Kennedy, J., concurring).

In *Verizon*, moreover, the Court confirmed that *Ex parte Young* does not call for a case-by-case approach based on "special sovereignty interests." There, the Fourth Circuit had adopted the case-by-case balancing test proposed by Justice Kennedy in *Coeur d'Alene*

Tribe, 521 U.S. at 270-280. Weighing the "federal interests" in the plaintiffs' claims against the "affront" to state sovereignty it believed to be threatened by the suit, the Fourth Circuit held that the plaintiffs could not bring an *Ex parte Young* suit against members of the Maryland Public Service Commission, challenging a ruling of the Commission. See *Bell Atl. Maryland Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 294-298 (4th Cir. 2001), vacated *sub nom. Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This Court rejected that analysis and adopted the "straightforward inquiry" set out in Justice O'Connor's *Coeur d'Alene Tribe* concurrence. See *Verizon*, 535 U.S. at 645. The Fourth Circuit therefore erred in this case in departing from the *Verizon* framework and holding that "special sovereignty interests" could justify barring petitioner's suit even though it otherwise satisfies the requirements of *Ex parte Young*.

2. Even if the court of appeals were correct that a case-specific consideration of "special sovereignty interests" has a place in the *Ex parte Young* analysis after *Verizon*, the court was wrong to conclude that such interests justified barring petitioner's suit here. Respondents and the court of appeals acknowledged that the relief that petitioner seeks and the nature of its claims do not themselves infringe any special sovereignty interest; an *Ex parte Young* suit would lie, respondents agree, if brought by a non-profit P&A system or an individual. The sovereignty interest on which respondents rely, therefore, pertains narrowly to the Commonwealth's asserted interest in not having its officials sued in federal court by another, independent component of the Commonwealth, regardless of the relief sought or the federal-law nature of the suit. Such a suit is no more

than an "intramural" dispute, the court of appeals asserted, and adjudication would result in a "substantial" "infringement on a state's sovereign dignity." *Id.* at 17a-18a (quoting *Virginia Office for Prot. & Advocacy* v. *Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring)). The court of appeals was mistaken.

a. Even if federal courts might in some circumstances appropriately refrain on sovereign immunity grounds from adjudicating a state-agency suit that otherwise satisfies *Ex parte Young*, no such circumstances are presented here. Far from being an "intramural contest," Pet. App. 17a (citation omitted), the suit here involves an independent entity that the Commonwealth voluntarily established to participate in federal programs that protect vulnerable individuals. The Commonwealth established petitioner specifically to enforce the *federal* duties that the Commonwealth agreed to assume under the DD and PAIMI Acts, see Pet. 6-7 & n.2, and petitioner receives funds to do so directly from the federal government, 42 U.S.C. 10823, 15042(b). When petitioner sues state officials to enforce its rights under the DD and PAIMI Acts, then, petitioner is implementing federal law and policy, not seeking relief that might be characterized as intramural in nature. In accepting federal funds, the Commonwealth agreed as a substantive matter that its facilities that provide services to the developmentally disabled and mentally ill would be subject to federal access rights conferred on the P&A system. A suit such as this one simply enforces those rights.

Nor can respondents contend that this suit is intramural on the notion that the parties lack adversity. A key feature of the DD and PAIMI Acts is their requirement that state-agency P&A systems, like non-profit

P&A systems, be independent of state governmental control. Congress so provided precisely because it recognized that in protecting the rights of the disabled, P&A systems must sometimes take an adversarial position vis-a-vis other state entities. See 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), 15044(a); S. Rep. No. 376, 101st Cong., 2d Sess. 12, 24 (1990) (*1990 Senate Report*). In accordance with federal law, the Commonwealth established petitioner as an independent agency that operates outside the Commonwealth's three branches of government. Pet. Br. 17-18; see Va. Code Ann. § 51.5-39.2(A) (2009). Only three of petitioner's eleven board members are appointed by the Governor, and petitioner has statutory authority to retain outside counsel in any matter. Va. Code Ann. § 2.2 510 (2008); Va. Code Ann. §§ 51-539.2(B) and .5(B) (2009). Petitioner is thus "insulated from the type of state control over policy * * * and governance that could justify treating this as an 'intramural' dispute." *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 373 (7th Cir. 2010) (en banc), petition for cert. pending, No. 10-131 (filed July 21, 2010) (*IPAS*); *id.* at 387 (Posner, J., concurring).

In any event, even if petitioner's suit might fairly be termed "intramural" in some sense, that is solely the result of the Commonwealth's own choices regarding the assignment of P&A functions. It is difficult to see how the Commonwealth's sovereignty or dignity is infringed as a result of its own choices. In voluntarily accepting federal funds under the DD and PAIMI Acts, the Commonwealth agreed that it would create a P&A system that would be empowered to enforce federal requirements, including access to records, against state-run facilities. In implementing that undertaking, the Com-

monwealth chose to create a state entity rather than assigning those functions to a private non-profit organization. Having made those choices, the Commonwealth cannot now argue that petitioner's efforts to enforce the requirements of the DD and PAIMI Acts are an "affront," Pet. App. 18a, while the same suit would be permissible if brought by a non-profit P&A. See *IPAS*, 603 F.3d at 373[4]; accord *id.* at 387 (Posner, J., concurring); cf. *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 438-439 (2004) (rejecting the argument that the Eleventh Amendment barred enforcement of a consent decree entered in an *Ex parte Young* suit, because the consent decree reflected the State's choice as to how to implement federal law, and "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law").

b. In concluding that petitioner's state-agency status, without more, gave rise to "special sovereignty interests" that barred this suit, the court of appeals also relied on *Pennhurst*, *supra*; *Alden* v. *Maine*, 527 U.S. 706 (1999); and *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), all of which the court viewed as establishing a general principle that federal courts should not adjudicate disputes between a state agency and state officials.

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[4] The en banc Seventh Circuit explained in unanimously holding that Indiana's state P&A system could invoke *Ex parte Young*:

> Indiana made the choice to set up IPAS as an independent state agency. If we gave that choice any weight in the Eleventh Amendment inquiry, we would be permitting Indiana to use its own choice to set up an independent state agency as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens. That result would be strange indeed.

603 F.3d at 373.

Pet. App. 18a-19a. None of these decisions lays down such a sweeping rule.

In *Pennhurst*, the Court held that *Ex parte Young* does not apply in suits alleging violations of state law, because the relief sought in such a suit would require a federal court to "instruct[] state officials on how to conform their conduct to state law," thereby "intru[ding] on state sovereignty" without vindicating any federal interest. 465 U.S. at 106. That conclusion reflects the fact that *Ex parte Young*'s animating principle—the "need to reconcile [the] competing interests" of the Eleventh Amendment and the Supremacy Clause—is "wholly absent" when no federal right is at stake. *Ibid.*; see *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986) (describing *Pennhurst* as a case in which "federal supremacy [was] not implicated"). It does not follow, and the *Pennhurst* Court nowhere suggested, that an *Ex parte Young* suit by a state entity seeking to enforce federal law would similarly intrude on state sovereignty. Cf. *Frew*, 540 U.S. at 439 (rejecting argument that *Pennhurst* and state sovereignty interests barred enforcement of a consent decree where the decree's terms exceeded federal-law obligations, because the decree as a whole vindicated federal law). Because petitioner seeks only to require state officials to comply with specific federal-law duties, *Pennhurst* is irrelevant.

In *Alden*, the Court held that Congress lacked the power under the Commerce Clause to abrogate a non-consenting State's immunity from damages actions in state court. Abrogating the State's Eleventh Amendment immunity in state court would, the Court reasoned, essentially enable Congress to assert "plenary federal control" over the States' allocation of internal political authority, thereby "commandeer[ing] the entire political

machinery of the State." 527 U.S. at 749. Congress clearly has not attempted to assert such control by giving States the opportunity to receive federal funding through the DD Act and PAIMI Act spending programs, and respondents cannot plausibly contend that the Commonwealth's voluntary participation in those programs and its agreement to the conditions of participation raise commandeering issues. Nor would permitting federal-court adjudication of this suit implicate *Alden*'s concerns about federal control over intrastate governance: granting the relief sought would not result in federal regulation of the structure of state government or purely internal political disputes. See *IPAS*, 603 F.3d at 387 (Posner, J., concurring).

In *Hunter* and its progeny, the Court held that state political subdivisions may not enforce certain constitutional provisions against their States. See 207 U.S. at 178-179; *Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923); see also *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009). Although the court of appeals acknowledged that "[s]overeign immunity was not at issue" in that line of cases, Pet. App. 23a, it nonetheless viewed those decisions as establishing a general rule that the Court is "unwilling[] to override the [S]tates' control of their own internal disputes." See *id.* at 22a-23a. The *Hunter* line of cases, however, merely stands for the more limited proposition that the constitutional provisions at issue in those cases did not regulate a State's relationship with its political subdivisions, see *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344 (1960), and therefore a political subdivision cannot prevail on the merits of those constitutional claims against the State. That conclusion does not create a blanket rule forbidding federal courts from adjudicating any suit between

different arms or creations of state government. Indeed, this Court has adjudicated such suits when—as here—the state entities are sufficiently independent of each other to create the requisite adversity. See, *e.g.*, *Lassen* v. *Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 459 n.1 (1967); *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441-1442 (2009) (adjudicating the merits of a suit by state agency against the State).

Even if the principles stated in *Hunter* and its progeny might in some circumstances suggest that a federal court should not adjudicate a state subdivision's *Ex parte Young* suit, this would not be such a case. The premise of the *Hunter* rule is that political subdivisions are "created as a convenient agency for the exercise of such of the governmental powers of the State as may be intrusted to it," and therefore they do not have certain constitutional rights against the State that created them. *Trenton*, 262 U.S. at 186. That premise does not apply here, given that the Commonwealth created petitioner for the express purpose of advocating for the rights of disabled individuals, many of whom are treated by state facilities, pursuant to federal statutes that explicitly confer judicially enforceable rights on petitioner vis-a-vis both state and private facilities.[5]

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[5] Before the court of appeals, respondents relied on two decisions that cited the *Hunter* line of cases in support of their holdings that the state-subdivision plaintiffs' *Ex parte Young* suits should not be adjudicated. See Resps. C.A. Br. 23-24 (citing *Kelley* v. *Metropolitan County Bd. of Educ.*, 836 F.2d 986 (6th Cir. 1987), cert. denied, 487 U.S. 1206 (1988), and *Harris* v. *Angelina County*, 31 F.3d 331 (5th Cir. 1994)). Both decisions involved attempts by state subdivisions found liable for federal-law violations to seek contribution from the State itself—relief that clearly is barred by *Edelman*, regardless of the nature of the plaintiff. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 250-252 (1985). Both *Kelley* and *Harris* cited *Trenton* by analogy, in

II. THE COURT OF APPEALS' DECISION LEAVES PETITIONER WITHOUT THE MEANS NECESSARY TO FULFILL THE CRUCIAL PROTECTIVE DUTIES THAT CONGRESS ENVISIONED

A. Petitioner's Access Rights Are Critical To Its Functions Under The DD And PAIMI Acts, But The Court Of Appeals' Decision Renders Those Rights Largely Unenforceable

1. Congress enacted the DD and PAIMI Acts in order to encourage the States to improve the treatment and care of vulnerable individuals. See, *e.g.*, *1974 Senate Report* 59. Within the statutory framework, the P&A systems are of "critical importance," because they are charged with ensuring that Congress's purpose is carried out on the ground—that disabled individuals are protected from abuse, and that they have access to legal remedies when abuse occurs. S. Rep. No. 493, 98th Cong., 2d Sess. 28 (1984) (*1984 Senate Report*) (P&A systems "assure disabled persons both protection of their rights under law and full access to federally funded programs"); see *1990 Senate Report* 12 ("It is the P&As that ensure that the rights of persons with developmental disabilities are protected and that public policy is translated into meaningful action.").

To ensure that P&A systems may fulfill their protective functions, Congress conferred on them broad au-

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the course of observing that the state-subdivision plaintiffs sought to use the federal courts to regulate internal political relations between the arms of state government, in order to circumvent state budgetary decisions. *Harris*, 31 F.3d at 339; *Kelley*, 836 F. 2d at 998. These concerns are not implicated here, for the reasons stated in the text. And unlike the plaintiffs in *Kelley* and *Harris*, petitioner seeks relief that does not itself offend any state sovereignty interests.

thority to investigate public and private treatment and care facilities. 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). In bestowing that authority on P&A systems, Congress expressly provided the systems with rights of prompt access to records, patients, and facilities whenever a system has probable cause to believe that abuse or neglect has occurred. See 42 U.S.C. 10805(a)(3) and (4); 15043(a)(2)(H)-(J); *1984 Senate Report* 30. These rights reflect Congress's intent that P&A systems should be able to respond quickly to individual instances of suspected abuse, and its determination that this capability is the most effective way to learn of abusive and neglectful conditions before they become systemic, and to protect individuals who are currently being abused or are in imminent danger. See *PAIMI Senate Report* 2-3.

The effectiveness of these statutory access rights depends on P&A systems' ability to enforce them through litigation when necessary. Congress therefore anticipated that P&A systems would sometimes have to resort to litigation, including against state facilities. 42 U.S.C. 10805(a)(1)(B) (P&A systems "shall * * * have the authority to" "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State"), 15043(a)(2)(A)(i) (same); see *1990 Senate Report* 24 (noting that bringing suit "against a State or [its] agencies * * * has been a longstanding responsibility of P&A Systems"); *1984 Senate Report* 28 (approving infrequency with which P&A systems filed suit, but noting that "there will undoubtedly be future instances where litigation is the necessary alternative to protect disabled persons' rights"). As Congress contemplated, P&A systems have used litiga-

tion when necessary to obtain injunctive and declaratory relief enforcing their access rights in a variety of contexts involving both state and private facilities. See, *e.g.*, *Disability Law Ctr. of Alaska, Inc.* v. *Anchorage Sch. Dist.*, 581 F.3d 936, 939-940 (9th Cir. 2009) (upholding non-profit P&A system's right to obtain contact information for guardians of disabled students in a public school); *State Office of Prot. & Advocacy for Persons with Disabilities* v. *Hartford Bd. of Educ.*, 464 F.3d 229, 239-242 (2d Cir. 2006) (upholding public P&A system's access to a state-run school for disabled children, to interview the children, and to obtain personal records); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 498-499 (11th Cir. 1996) (upholding public P&A system's access to medical records of patients in a state facility).

2. Under the court of appeals' decision, however, petitioner effectively will be unable to enforce its access rights against state-run institutions in any forum. According to respondents and the court of appeals, petitioner's only potentially available avenue to obtain the records it seeks would be an action for mandamus in the Virginia Supreme Court. Pet. App. 25a-26a; Br. in Opp. 26. But under Virginia law, mandamus is an "extraordinary remedy" available only upon a showing of "clear and certain" entitlement and at the court's discretion. See *Gannon* v. *State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992); see also *Umstattd* v. *Centex Homes, G.P.*, 650 S.E.2d 527, 530 (Va. 2007). The need to establish circumstances justifying the court's "extraordinary" exercise of discretion, *ibid.*, would render the possibility of mandamus relief highly contingent, and discretionary denials of relief may be insulated from this Court's re-

view. See *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U.S. 241, 243 (1978).

Moreover, the delay incumbent in a state mandamus proceeding would render it ineffective. Preliminary relief—which P&A systems often invoke in order to further their ability to respond expeditiously to ongoing and imminent abuse—is not available in a mandamus proceeding. See Pet. 27; *IPAS*, 603 F.3d at 374 n.7 (state-court mandamus remedy is inadequate because "Congress clearly intended [P&A systems] * * * to be able to respond quickly to threats of imminent harm"). In short, a mandamus proceeding brought under the original jurisdiction of the Virginia Supreme Court would not provide an adequate means of judicially enforcing petitioner's access rights under the DD and PAIMI Acts.

Respondents also suggest that petitioner could invoke *Ex parte Young* to obtain remedies in federal court by bringing suit in the name of a "private litigant." Resps. Supp. Br. 2 n.1. Although the DD and PAIMI Acts vest P&A systems with the authority to pursue legal remedies on behalf of individual plaintiffs, 42 U.S.C. 10805(a)(1)(C), 15044(b), such a suit would not provide an adequate means of enforcing petitioner's statutory access rights.[6] The Acts grant access rights to P&A systems, not to individuals, whose rights to obtain their treatment records are governed by other state and federal laws. Indeed, many of the access rights conferred

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[6] Suits in which a P&A system acts as counsel to an individual plaintiff include those in which the individual seeks to enforce rights conferred by other federal statutes, such as the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* See, *e.g.*, *Feldman* v. *Oakland Univ. Bd. of Trs.*, No. 08-14922, 2010 WL 2572768, at *1-*2 (E.D. Mich. June 23, 2010).

by the DD and PAIMI Acts are clearly not intended to be—and could not be—enforced by individual patients named as plaintiffs. These include the rights to obtain access to facilities and patients; and the right to obtain access to the records of individuals who do not have the capacity to authorize access, 42 U.S.C. 15043(a)(2)(I)(ii), individuals who have not had an opportunity to consent in emergency situations, 42 U.S.C. 15043(a)(2)(J)(ii), and individuals whose guardians have failed or refused to take action on their own, 42 U.S.C. 15043(a)(2)(I)(iii).

Under respondents' view, then, public P&A systems would be unable effectively to enforce their access rights in any forum. It is no answer to suggest that the federal government could fill the resulting enforcement gap. Even if the government might bring enforcement actions on its own, see *IPAS*, 603 F.3d at 384 (Posner, J., concurring), it cannot duplicate in every jurisdiction the P&A systems' ability to conduct individual, quick-response investigations, and thus it cannot perform the P&A systems' function as Congress contemplated. See, *e.g.*, *1984 Senate Report* 28 (P&As are a "local and thus available resource"). And although HHS may suspend or terminate funding to non-compliant States, 42 C.F.R. 51.10, 45 C.F.R. 1386.111, that drastic remedy is too blunt an instrument to be used to respond to or remedy individual instances of abuse and neglect. Terminating funding would simply penalize the P&A system and the disabled individuals who are "the intended beneficiaries of the federal program." *IPAS*, 603 F.3d at 383 (Posner, J., concurring). Protecting disabled individuals in the manner contemplated by Congress therefore depends on the investigatory powers vested in the local P&A systems, which in turn are founded on access to records, facilities and individuals. See *ibid.*

B. The Court Of Appeals' Decision Creates Inequalities Between Public And Private P&A Systems That Congress Did Not Intend

By leaving petitioner and other public P&A systems without a remedy, respondents' position would create a two-tiered enforcement system that undermines the congressional purpose of ensuring that protection and advocacy services are as broadly available as possible. See *1984 Senate Report* 28. Respondents acknowledge that private P&A systems may invoke *Ex parte Young* in federal-court suits against officials of state institutions, because the "special sovereignty interest" purportedly created by petitioner's state-agency status is not present in such suits. In respondents' view, then, non-profit P&A systems may enforce their access rights against both state and public institutions, but public P&A systems are limited to enforcing remedies against private facilities. If that were the case, patients or clients of public facilities in States with public P&A systems would not receive the full extent of the protections provided in the DD and PAIMI Acts.

Nothing in the DD and PAIMI Acts differentiates between the capabilities of private and public P&A systems; the Acts assume that both will be equally able to fulfill their investigative and protective functions with respect to disabled and mentally ill individuals. See 42 U.S.C. 10802(2), 10805, 15043(a). Moreover, the Acts contain several provisions designed to take into account the different ways in which States may organize their P&A systems, and to ensure that all systems, however organized, will be independent and able to effectively advocate their clients' rights. See, *e.g.*, 42 U.S.C. 15043(a)(2)(G) (requiring independence), 15044(a)(1) (multi-member governing boards of both public and non-

profit P&As must include disabled individuals), (a)(2) (where state executive has appointment authority, he may appoint no more than one-third of board members), (a)(5) (public system without a board must have an advisory council that includes disabled individuals). These provisions reflect Congress's intent that States' internal governance choices with respect to P&A systems should not affect the systems' ability to perform their functions or disabled individuals' ability to receive the benefits for which Congress created the DD and PAIMI programs. Respondents' position would create disparities that Congress did not intend.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2010

AMICUS CURIAE BRIEF

No. 09-529

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL,

Respondents,

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF AMICUS CURIAE OF AARP, THE NATIONAL SENIORS CITIZENS LAW CENTER, THE ARC OF THE UNITED STATES, THE NATIONAL HEALTH LAW PROGRAM AND UNITED CEREBRAL PALSY IN SUPPORT OF THE PETITIONER

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STATEMENTS OF INTEREST[1]

AARP

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interests of people age 50 and older. AARP's members include residents of nursing homes and other long-term care facilities, their spouses, and other relatives. AARP supports enactment and enforcement of laws that ensure that all people in long term care facilities and other institutional settings are protected from abuse and neglect. AARP often allies with state Protection and Advocacy ("P&A") systems to promote the welfare and safety of older persons and persons with disabilities in the community and in facilities.

National Senior Citizens Law Center

The National Senior Citizens Law Center ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through

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[1] No counsel for a party authored this brief in whole or in part nor did any counsel or party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution. Amici state that counsel of record for all parties received notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief. Said consent was granted.

litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs and P&A agencies. NSCLC's *Federal Rights Project* works to ensure access to the federal courts to enforce safety net and civil rights statutes. NSCLC has participated as counsel in numerous lawsuits regarding court access for people with disabilities. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' access to the federal courts.

The Arc of the United States

The Arc of the United States ("The Arc"), through its 730 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with intellectual and developmental disabilities (I/DD) and their families. Since its inception, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services and supports for, people with intellectual and related developmental disabilities. The Arc has partnered often with State Protection and Advocacy systems to preserve these rights and supports for our constituents.

National Health Law Program

The National Health Law Program ("NHeLP") has represented thousands of families and children, elderly people, and people with disabilities in federal court cases when state Medicaid programs are not

acting consistent with the federal Medicaid Act. Believing that the ability of private citizens to enforce their federal rights against states in court is absolutely essential if social justice is to have meaning in daily life, through its Health Activist Court Watch Project NHeLP has worked to ensure that Medicaid beneficiaries receive the statutory and constitutional due process protections to which they are entitled and that program beneficiaries have avenues for redress when their requests for services are denied or not acted on.

United Cerebral Palsy

United Cerebral Palsy ("UCP") is comprised of approximately 100 affiliates interspersed throughout the country. These affiliates serve more than 170,000 children and adults with disabilities every day, with more than one half having disabilities other than cerebral palsy. UCP's mission is to advance the independence, productivity and full citizenship of people with disabilities through their affiliate network. UCP affiliates often work directly with state Protection and Advocacy Systems in relationship to achieving its mission.

SUMMARY OF THE ARGUMENT

The Fourth Circuit utilized a far-reaching rationale to improperly deny access to federal court. The decision below unduly amplifies the exception to prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), expansively interpreting the concepts of state sovereignty interests and dignity to

immunize states from suit. By so doing, the appellate court's opinion threatens to undermine the supremacy of federal law, not only for civil rights and safety-net statutes but also for a wide-range of federal statutes of great importance to business interests.

The decision below sought to relegate the claims in this case to state court. Yet, it is far more likely that Petitioner, the Virginia Office of Protection and Advocacy ("VOPA"), would obtain a just result ensuring the supremacy of federal law in the federal court forum. For resolution of federal issues, federal courts have many structural advantages over state courts, including uniform interpretation and expertise in federal law.

Without access to federal court, the investigative power of federally funded Protection and Advocacy ("P&A") organizations, such as VOPA, is compromised. P&A organizations are essential to remedying and preventing abuse and neglect of older persons and people with disabilities. Because significant numbers of people with disabilities and older persons, especially those in institutional facilities, are at risk for abuse and neglect, the Court should not limit court access for VOPA to enforce its right to investigate abuse and neglect.

ARGUMENT

I. THE CIRCUIT COURT'S LIMITATION OF *EX PARTE YOUNG* BASED ON AN EXPANSIVE VIEW OF STATE SOVEREIGNTY INTERESTS AND "DIGNITY" THREATENS THE SUPREMACY OF FEDERAL LAW

The decision below creates a nebulous exception to *Ex parte Young* which could undermine a century of precedent. VOPA sued Virginia state officials in federal court to obtain medical records pursuant to the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 *et seq.*) to investigate possible abuse and neglect of people with disabilities. State officials refused to provide the records, based on state law that bars the release of records involving peer review privilege. The Fourth Circuit held that ordering the state to comply with federal law would encroach on Virginia's "dignity" and sovereignty interests. App. 18a. The circuit court's expansive reliance on the subjective standard of sovereign "dignity" jeopardizes case law in which the supremacy of federal law has been secured by *Ex parte Young*.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 287 (1997), held that "special sovereignty interests" barred application of *Ex parte Young* to a suit which was the functional equivalent of a quiet title suit, referencing the "dignity" of states. Shortly

thereafter, in the context of a telecommunications suit, the Fourth Circuit sought to vastly expand the immunity of states from suit, holding that it would be a "serious offense to the dignity of a State's quasi-official body" to permit a federal court to review the claim that a state agency's telecommunications decision was not in compliance with federal law. *Bell Atlantic MD, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 298 (4th Cir. 2001). This Court unanimously reversed, finding no offense to state dignity or sovereign interests in a federal court's review of whether "state officials be restrained from enforcing an order in contravention of controlling federal law." *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002). The Fourth Circuit's attempt in the instant case to insulate states from suit based on a broad interpretation of state sovereign "dignity" should likewise be reversed.

Many states have cited *Coeur d'Alene* in arguing for immunization from suit under *Ex parte Young* based on a virtually limitless notion of states' sovereign interests and dignity. Numerous decisions of courts of appeals, including other decisions of the Fourth Circuit, have correctly rejected states' attempts to eviscerate *Ex parte Young* under states' boundless view of their sovereign dignity and core interests. The instant case conflicts with numerous correctly decided appellate cases which have upheld the supremacy of federal law.

A. The Supremacy of Federal Safety-Net and Civil Rights Statutes Could be Jeopardized by an Unbounded Exception to *Ex parte Young* for State Sovereign Interests and "Dignity"

In 1974, in a decision by then-Associate Justice Rehnquist, the Court held that *Ex parte Young* permitted suit against a state to enjoin a state law which conflicted with a federal welfare statute. *Edelman v. Jordan*, 415 U.S. 651 (1974). The Court explained:

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

415 U.S. at 664. Decades later, Chief Justice Rehnquist made clear that even when damages are not available in a civil rights case, people with disabilities have "federal recourse against discrimination" by filing "actions for injunctive relief

under *Ex parte Young*." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

Yet, attempting to expand *Coeur d'Alene*, several states argued strenuously that suits filed by individuals for prospective relief to enforce federal statutes encroached upon states' sovereign interests and "dignity." The examples below demonstrate that states have sought to avoid individual enforcement of safety-net and civil rights statutes under *Ex parte Young* by claiming offense to state sovereign interests and "dignity." Indeed, the states' vision of their core interests and sovereign "dignity" is so broad as to completely eviscerate *Ex parte Young's* protection of the supremacy of federal law.

In a suit alleging that New Mexico violated the federal Medicaid statute by placing low-income disabled and older individuals on a waiting list for as many as seven years without providing services, the state argued that an action for prospective equitable relief under the Medicaid statute "invades special sovereignty interests." *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 978 (10th Cir. 2001). Rejecting that contention, the Tenth Circuit held that the state's administration of a program that is partially funded by the federal government does not implicate a core sovereign interest and does not strike at a state's fundamental power. *Id.* In a subsequent case alleging that New Mexico failed to provide abused and neglected children with adoption services, the state continued to assert that "*Coeur d'Alene* bars the application of *Ex parte Young*." *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253,

1260 (10th Cir. 2002). The Tenth Circuit held that while "a state's administration of federally-funded welfare programs for children in its custody involves important state interests, those interests do not implicate the 'essential attribute[s] of sovereignty' with which *Coeur d'Alene* was concerned." *Id.* at 1261. North Carolina similarly argued that it had a "special sovereignty interest" in deciding how to spend Medicaid funds. *Antrican v. Odom*, 290 F.3d 178, 189 (4th Cir. 2002). The Fourth Circuit noted that Medicaid is a federally designed and funded health care program. The court concluded: "[a]lthough North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program." *Id.* at 190.

States have likewise unsuccessfully claimed that prospective relief under the Constitution and civil rights laws would encroach on their special sovereignty interests. In a case involving the education of minority students and students with disabilities that alleged violations of the Fourteenth Amendment, the Rehabilitation Act, and Title VI of the Civil Rights Act, Kansas asserted that prospective relief under *Ex parte Young* would "implicate special sovereignty interests similar to those set out in *Coeur d'Alene*." *Robinson v. Kansas*, 295 F.3d 1183, 1191 (10th Cir. 2002). The court held that an order enjoining the state from enforcing a state education financing law that conflicts with federal law would not "not come close" to the

sovereignty interests in *Coeur d'Alene*. *Id.* at 1191. New Mexico similarly argued that an employment discrimination claim under the Age Discrimination in Employment Act (ADEA) "presents an impermissible affront to New Mexico's special sovereign interests or its political autonomy." *Gill v. Pub. Employees Ret. Bd. of Pub. Employees Ret. Ass'n of N.M.*, 90 P.3d 491, 501 (N.M. 2004). Citing numerous Tenth Circuit cases, the New Mexico Supreme Court held that a claim for prospective, injunctive relief under the ADEA did not implicate special state sovereign interests. *Id.* The Seventh Circuit also held that a suit to obtain Illinois's compliance with the federal Individuals with Disabilities Education Act in the education of infants with disabilities "implicates no important sovereignty interests such as those at stake in" *Coeur d'Alene*. *Marie O. v. Edgar*, 131 F.3d 610, 617 n.13 (7th Cir. 1997).

Thus, states have attempted to evade multiple suits by asserting the claim of special sovereignty interests in important civil rights and safety net cases. While appellate courts have rejected those claims in the past, the Court risks undermining more than just the P&A statutes if it denies VOPA federal court access to enjoin state law preempted by the federal PAIMI Act. This Court should not expand the exception to *Ex parte Young* based on the unbounded concept of state sovereign interests and "dignity," because this will threaten the supremacy of federal law, including laws seeking to protect people with disabilities.

B. The Supremacy of Numerous Laws Important to Businesses Could be Threatened by an Expansion of the State "Dignity" Exception to *Ex parte Young*

States' attempts to enlarge the exception to *Ex parte Young* based on their "special sovereignty interests" and "dignity" have not been confined to suits under safety-net and civil rights statutes. Indeed, states have argued for a vast expansion of this exception in many suits brought by businesses involving a wide range of laws.

For instance, in a suit brought by a railroad company alleging state law conflicted with federal law regarding constructing and repairing railroad lines, South Dakota argued that the suit encroached on its "core sovereign interest" emanating from its police power. *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512, 516-17 (8th Cir. 2004). Rejecting the state's attempt to amplify sovereign immunity, the Eighth Circuit explained, "*Coeur d'Alene Tribe* cannot apply to every suit for injunctive relief against a state official's exercise of the police power-that would effectively overrule the *Ex parte Young* doctrine." *Id.*

California similarly argued that its police powers trumped *Ex parte Young* in a case brought by an energy supplier alleging that the state's commandeering of contractual rights to deliver electricity violated the Federal Power Act. *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267

F.3d 1042, 1052-53 (9th Cir. 2001). The court agreed that during an electricity crisis, the state's "emergency powers to take private property for the public's benefit and safety" constituted a "core state sovereignty area." *Id.* at 1053. But the court found that the suit would not divest the state's sovereign power. The Ninth Circuit explained that "an injunction against a specific executive order in an area preempted by federal law ... falls squarely under *Ex parte Young*," and this relief would not "deprive Governor Davis of his regulatory authority and police power to deal with the electricity crisis." *Id.* at 1053-54.

States' sovereignty arguments have not been limited to their police powers. In an antitrust suit brought by a liquor retailer challenging price controls, Maryland asserted that it had a special sovereignty interest "in liquor regulation," relying on *Coeur d'Alene*. *TFWS v. Schaefer*, 242 F.3d 198, 205 (4th Cir. 2001). The Fourth Circuit rejected the state's contention that the state's authority to regulate liquor constituted a special sovereign interest. The court further noted that even if a special sovereign interest was implicated, *Coeur d'Alene's* exception applies only when an injunction would completely eliminate a state's regulatory authority. *Id.* at 206. The court explained that the liquor retailer was "not seeking to strip Maryland of its authority to regulate liquor under the Twenty-first Amendment; it simply seeks to require the Comptroller to regulate in a way that is consistent with [federal law]." *Id.*

In the telecommunications context, Illinois and Wisconsin argued that *Ex parte Young* suits brought by private carriers to invalidate state laws conflicting with the federal Telecommunications Act would "trammel 'special sovereignty interests.'" *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 347-48 (7th Cir. 2000). The Seventh Circuit held that the states' interest in the regulation of telecommunications providers was not comparable to the fundamental state interest in land ownership in *Coeur d'Alene*. The court noted that the states' interests were "derived solely from the regulatory role Congress has bestowed upon the states" and did not "strike at core functions or core powers." *Id.* at 348. The Third Circuit likewise held that Pennsylvania's interest in making and carrying out telecommunications regulatory decisions "cannot be viewed as a core or fundamental matter of state sovereignty comparable to the ability of a state to maintain ownership of and title to its submerged lands." *MCI Telecommunciations Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 514-15 (3d Cir. 2001).

In sum, states have argued in numerous contexts that suits to obtain compliance with federal law offend their sovereign interests and dignity. Far from being a narrow decision, the Fourth Circuit's emphasis on state sovereign "dignity" in the instant case has the potential to nullify *Ex parte Young* and thereby undermine the supremacy of federal law.

II. THE STATE COURT FORUM IS NOT EQUIVALENT TO THE FEDERAL COURT FORUM FOR A SUIT TO ENJOIN ENFORCEMENT OF A STATE LAW WHICH CONFLICTS WITH FEDERAL LAW

The Fourth Circuit opined that VOPA would be able to obtain "a just resolution of its claims" by bringing suit in state court to enforce federal law. App. 28a. Yet, the federal courts have many structural advantages over state courts for resolution of federal issues, including "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 483-484 (1981) (footnotes omitted). See also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996)(federal courts provide "greater uniformity of construction and more effective and expert application of [federal] law".) The American Law Institute observed: "The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal questions were given to state courts." ALI, Study of the Division of Jurisdiction Between State and Federal Courts 164-165 (1969) (hereinafter "ALI Study"). This Court has referred to "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Products, Inc. v. Darue Engineering*, 545 U.S. 308, 312, 310 (2005) (holding "the national interest in providing a federal forum

for federal tax litigation" to be sufficient to support federal-question jurisdiction over a claim-of-title dispute). *See also* Martin H. Reddish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329 (1988) (greater familiarity of federal judges with federal law).

There are significant barriers to VOPA obtaining justice in state court, particularly for the type of claim at issue in this case. The protection and advocacy system is a federally-funded network of entities that fulfill a critical federal mandate. "The core requirement of the federal P&A statutes is that, in order to receive federal funding, each state must establish an effective protection and advocacy system to respond to allegations of abuse and neglect and generally to protect the rights of individuals with disabilities. 42 U.S.C. § 15043(a)(2)(A)(i); 42 U.S.C. § 10805(a)(1); 29 U.S.C. § 794e(f)(3)." *Disability Rights Wisconsin, Inc. v. Wisconsin Dept. of Public Instruction*, 463 F.3d 719 (7th Cir. 2006). VOPA's federal mandate requires that it, on occasion, challenge state and administrative practices that have a discriminatory or otherwise negative impact on people with disabilities in the state. The American Law Institute has warned, "[s]uits in which it is claimed that state legislative or administrative action is invalid because contrary to controlling federal law present an especially appealing case for original federal jurisdiction. The danger of state court hostility to the federal claim is greatest in such suits." ALI Study, *supra*, at 282.

Congress has been concerned that "state instrumentalities could not protect" federally created rights and "realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum v. Foster,* 407 U.S. 225, 242 (1972). Due to possible state court hostility toward the enforcement of federal law, "this Court long ago recognized" the importance of "federal injunctive relief against a state court proceeding." *Id.*, citing *Ex parte Young. See also Monroe v. Pape,* 365 U.S. 167, 180 (1961). This Court recently observed in a unanimous decision: "State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials." *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 150 (2007).

The political affiliations of state judges can lead to undue deference to state officials and a heightened concern for the state treasury, especially in regard to a claim against state officials to enforce federal law. *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans With Disabilities Act After Seminole Tribe and Flores*, 41 Ariz. L. Rev 651, 658 (1991). As Justice O'Connor noted, "If the state has a problem with judicial impartiality, it is largely one the state brought upon itself by continuing the practice of popularly electing judges." *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

It is far more likely that VOPA would obtain a just, impartial resolution of its claims in federal

court. The circuit court's refusal to permit federal court access to resolve whether Virginia's privilege law conflicted with the PAIMI Act does not adequately protect the supremacy of federal law.

III. THE INVESTIGATIVE POWERS OF P&A ORGANIZATIONS ARE OF VITAL IMPORTANCE TO PREVENT THE ABUSE AND NEGLECT OF OLDER PERSONS AND PEOPLE WITH DISABILITIES

Abuse and neglect in community and institutional settings is a serious and often hidden problem for older persons and people with disabilities. The federal government relies upon states to both uncover problems and sanction noncompliance. Yet, states have proved inadequate at both quantifying and remedying deficiencies. The independent investigative power of P&A organizations is of crucial importance to the protection of residents of institutional facilities.

Despite more than thirty years of federal regulation under nursing home legislation, the residents of most nursing facilities continue to be subject to substandard care at shocking levels. The federal Office of the Inspector General has found that most nursing facilities do not comply with federal standards, based on statistics reported by states. In 2007, more than 90 percent of nursing homes in the country were cited by state surveys for violations of federal health and safety standards, with 17 percent cited for deficiencies that caused

residents "actual harm or immediate jeopardy." Dept. of Health and Human Services, Office of Inspector General, OEI-02-08-00140, *Memorandum Rept.: Trends in Nursing Home Deficiencies and Complaints* at 1 (Sept. 2008) at 1, 9-10, *available at* http://oig.hhs.gov/oei/reports/oei-02-08-00140.pdf. Thus, the vast majority of nursing facilities do not meet federal standards, and these substandard conditions result in harm to residents.

The scope of abuse and neglect is far greater than this federal report shows, because state surveys of compliance with federal quality standards repeatedly understate serious deficiencies. The federal Government Accountability Office ("GAO") has documented that state surveys undercount harmful conditions in nursing facilities. According to the GAO, "[f]rom fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance – the actual harm and immediate jeopardy levels." U.S. Gov't Accountability Office, GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses* at 11 (2008), *available at* http://www.gao.gov/new.items/d08517.pdf. Statistics of the incidence of abuse and neglect of older people, for example, are believed to represent only a fraction of the true crisis because of varying state definitions of abuse and under reporting. *See e.g.* Brian K. Payne & Randy R. Gainey, *The Criminal Justice Response to Elder Abuse in Nursing Homes: A*

Routine Activities Perspective, 7(3) Western Criminology Review, 67 (2006). These statistics demonstrate the inadequacy of state efforts to uncover and eradicate abuse and neglect. Despite best efforts by regulators and ombudsmen, the problems are pervasive. Congress wisely saw the need for an independent entity, backed by federal legislative authority, to access the hallways and backwards of institutions, examine records with a trained eye and offer legal advocacy when people have unjustly suffered harm. This advocacy is designed not only to assist those who have been injured but also to improve conditions in order to protect future residents. Reasonable, unfettered access to people and records is essential for the P&A to perform the kind of individual and systemic advocacy Congress envisioned.

In addition, the P&A organizations' access to medical records is of vital importance to remedying violations of federal law for people with disabilities residing in the community. For example, in *Ball v. Rogers,* 492 F.3d 1094 (9th Cir. 2007), older persons and people with disabilities alleged that the state had failed to timely provide Medicaid home and community based health services. The "on the ground" ability of the Arizona P&A organization to gain access to persons and their records from the state agency contributed to the basis for this suit alleging violations of the federal Medicaid statute, the Americans with Disabilities Act, and the Rehabilitation Act. Similarly, in *Lankford v. Sherman,* 451 F.3d 496 (8th Cir. 2007), wherein the state refused to provide durable medical equipment

to adults with disabilities, the Missouri P&A organization played a vital role in the litigation through its access to injured persons and their records.

Organizations such as VOPA fulfill a critical role in investigating and seeking to address the systemic failures that give rise to the abuse and neglect of people with disabilities and older people. The decision below blocks VOPA from performing its duties based on the purported "sovereign interests and dignity" of the Commonwealth of Virginia. Yet, this ruling threatens the well-being and dignity of older persons and those with disabilities not only in Virginia but also in the seven other states and territories that have "independent" state agencies which have been designated as the states' P&A systems.

CONCLUSION

For the reasons stated, *amici* urge the Court to reverse the decision below.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 09-529

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the
VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY
Petitioner,

v.

JAMES W. STEWART, III, in his official capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and VICKI Y. MONTGOMERY, in her official capacity as Acting Director, Central State Hospital
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, FLORIDA, HAWAII, LOUISIANA, MAINE, MICHIGAN, NEW HAMPSHIRE, NEW JERSEY, PENNSYLVANIA, SOUTH CAROLINA, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

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INTEREST OF THE *AMICI* STATES

The *Amici* States respectfully submit this brief in support of the Respondents, who are various state officials in charge of Virginia agencies and hospitals that provide care and services to the disabled and mentally ill. The Petitioner is a Virginia state agency charged with providing "protection and advocacy" services to the disabled and mentally ill. Hence, this case is about whether federal courts may entertain lawsuits brought by one state agency against officials of another agency of the same state, or whether the integrity of state sovereignty precludes that from happening. The *Amici* States have a compelling interest in protecting their sovereignty by seeing to it that any intramural legal disputes are resolved in their state courts (if in any court) rather than the courts of another sovereign.

Two federal programs directed at the same objectives are in play—the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (codified at 42 U.S.C. §§ 15001-115 (2000)) ("DDA Act"), and the Protection and Advocacy for Individuals with Mental Illnesses Act, Pub. L. No. 99-319, 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 10801-851) ("PAIMI").[1] The DDA Act authorizes a grant

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[1] This statute was originally known as the "Protection and Advocacy for Mentally Ill Individuals Act of 1986," but a 1991 amendment substituted "individuals with mental illness" for "mentally ill individuals" wherever appearing in text. 1991 Amendments Subsec. (a). Pub.L. 102-173, § 10(2). Thus, the statute is now known as the "Protection and Advocacy for Individuals with Mental Illness Act" or PAIMI.

program to assist states in providing services to individuals with disabilities. *See* 42 U.S.C. § 15001(b). The Act requires states receiving these federal grants to designate or establish "protection and advocacy systems" devoted to the needs of the disabled. 42 U.S.C. § 15001(b)(2). For its part, PAIMI, 42 U.S.C. §§ 10801 to 10851, provides funding for these "P&A systems" and expands the mission of the DDA Act to encompass services for, and P&A system protection of, the mentally ill.

Under PAIMI, states may choose either to create a P&A system that is a state agency or to designate a private, non-profit entity to serve that function. Along with Virginia and Indiana, Alabama (via gubernatorial directive), Connecticut, Kentucky, New York, North Dakota, and Ohio have created state agencies to be their P&A systems. *See* Conn. Gen. Stat. § 46a-7 *et seq.*; Ind. Code § 12-28-1-1 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq.*; Va. Code Ann. § 51.5-39.2(A). All other states participate in the DDA Act/PAIMI program, but have designated non-profit corporations to fulfill their P&A system obligations. *See* Administration on Developmental Disabilities, U.S. Dep't of Health & Human Services, *State Protection and Advocacy Agencies*, http://www.acf.hhs.gov/programs/add/states/pas.html (last visited Oct. 21, 2010) (listing state P&A systems).

Regardless of the nature of their P&A systems, potentially all states have a stake in this litigation. Many states, if not all, have created a variety of

"independent" agencies—that is, agencies that are not subject to the control of the governor or his appointees—that may initiate their own litigation without the approval of, or representation by, the state's attorney general. In such a situation, no internal mechanism exists to prevent such an independent agency from suing another agency of the same state in federal court. Thus, if federal courts may entertain intramural state lawsuits, potentially all states (or nearly all) will be vulnerable to such suits.

SUMMARY OF THE ARGUMENT

This case is about preserving the integrity of a state's sovereign immunity by refusing to allow a state to sue its own officials in federal court. If the Fourth Circuit's ruling is overturned, it is not only P&A systems that would be affected. Any state agency that is not controlled by the governor or his appointees and is not subject to attorney general approval or representation in filing lawsuits would gain the ability to file lawsuits in federal court against fellow-state officials. Many, if not all, states have such agencies and would, thus, be vulnerable to intramural lawsuits in federal courts.

Further, the Petitioner's attempt to expand the *Ex parte Young* exception to sovereign immunity here would radically expand that doctrine. This unprecedented expansion of *Young* would divide state governments against themselves and subvert the core justifications for sovereign immunity. Such a result would defy both historic and modern understandings of the nature of sovereignty.

ARGUMENT

I. Allowing a State to Sue Itself in Federal Court Would Have Far-Reaching Implications on State Governments

In both Virginia and Indiana, state agency P&A systems have recently filed suit against sister agencies in federal court. In Indiana's case, the Indiana Protection and Advocacy System (IPAS) sued officials of the Indiana Family and Social Services Administration and two of its agencies, the Division of Mental Health and Addiction and Larue Carter Hospital, seeking documents relating to two IPAS clients. *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 368-70 (7th Cir. 2010) (en banc), *petition for cert. filed,* No. 10-131 (July 21, 2010). Non-profit corporation P&A systems have also frequently sued state officials, typically seeking documents relating to their clients. *See, e.g., Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1264 (10th Cir. 2003); *Penn. Prot. & Advocacy v. Houstoun*, 228 F.3d 423, 425 (3rd Cir. 2000) (Alito, J.). While questions linger as to whether the DDA Act and PAIMI actually afford P&A systems (of whatever stripe) a cause of action, *see Indiana Protection & Advocacy Services*, 603 F.3d at 388-94 (Easterbrook, C.J., dissenting), there is no doubt that all P&A systems, non-profits and government agencies alike, view federal court litigation as a viable and potent tool.

It is not only P&A systems that would be able to sue their sister agencies' leaders in federal court if the decision below is overturned. Any state agency that is (1) not controlled by the governor or made up of appointees accountable to the governor, and (2) not subject to attorney general approval or representation in filing lawsuits, would be on the same footing as VOPA and IPAS.

1. With respect to agencies controlled by a governor, it is reasonable to expect the governor to resolve inter-agency disputes rather than permit litigation of any sort. Where agencies are controlled either by independently elected officials or fixed-term appointees, however, the governor is not in position to unify state policy, and the potential for inter-agency legal conflict exists.

Every state has some variant of the divided executive model. In all but one, executive power is not concentrated in the governor, but rather split among other officials such as lieutenant governors, secretaries of state, auditors, treasurers, secretaries of education, insurance commissioners, and attorneys general, who are separately elected by the voters or appointed by the legislature (if not appointed by the governor). *See* G. Alan Tarr, *Understanding State Constitutions* 17 (1998). The remaining state is New Jersey, which elects its governor and lieutenant governor in tandem and then allows the governor to appoint both the secretary of state and attorney general. *See* N.J. Const. art. V, § 4. But even there, these appointees have independent constitutional authority and serve

for fixed terms (rather than at the pleasure of the governor). *Id.* No state, that is, has adopted the unified executive model of the federal government.

Over the last two centuries, multiple political philosophies have prompted state efforts to establish executive power directly accountable to the electorate, and then to divide it among multiple independently elected officials. In the immediate post-colonial period, legislatures reigned supreme in terms of state constitutional power, appointing most governors and other executive officers. *See* Laura J. Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820-1850* 7-8 (1999); Tarr, *supra*, at 87. In the decade leading to the adoption of the U.S. Constitution, however, several states began electing their governors, a trend that continued after 1787. Tarr, *supra*, at 87-89.

Once state executive power became directly accountable to the electorate, the divided-executive model became popular during the "Era of Jackson," when states sought to expand the democratic ideal through the concept of "rotation in office." *See The History of Indiana Law* 258 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006); *see also* John D. Dinan, *The American State Constitutional Tradition* 4, 9 (2009). By 1853, all states selected their governors by direct popular election "as well as previously appointed, low-level executive officers, such as the attorney general and treasurer." Scalia, *supra*, at 7-8. By 1880, over two-thirds of states elected the secretary of state, treasurer, auditor and attorney general. Tarr, *supra*, at 121-22. As

professor Albert Sturm has observed, during the Jacksonian era "the policy of frequent elections and rotation in office resulting in a multiheaded executive department diminished the governor's administrative power . . . ." Albert Sturm, *The Development of American State Constitutions*, Publius 12, No. 1, 65 (1982).

In the wake of the Civil War, the growing impact of the Second Industrial Revolution prompted states to turn their attention to regulating railroads, utilities, banks and other corporations. *Id.* at 68. "Generally, the new agencies were not controlled by the governor. *** [H]is administrative control diminished as independent state agencies proliferated with consequent further dispersion of executive power." *Id.*

Furthermore, while the Jacksonian democratic philosophy yielded more elected officials who could act independently, it simultaneously blessed expanded patronage. *See* Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 Am. U. L. Rev. 11, 15-16 (1989). Abusive patronage practices eventually inspired a backlash in favor of even *more* independent administrative officials—not elected, but appointed with fixed terms. During the Progressive and New Deal Eras, such independent government agencies became popular as a means of achieving "good government" devoid of political strife and excessive patronage. *See, e.g.*, Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 588 (2d ed. 2001); Tarr, *supra*, at 151 (observing that Progressive reformers "proposed the creation of a

bureaucracy that, freed from politics, would have broad discretion to use its neutral expertise to administer policy in the public interest"). Thus did a Jacksonian tenet favoring more executive officials with greater democratic accountability give way to a Progressive impulse empowering a larger administrative state with less political dependence.

Consequently, independent state agencies and commissions have proliferated throughout the country. States have even enshrined a variety of independent agencies and commissions in constitutional text, ranging from such nineteenth-century creations as railroad commissions (Mo. Const. art. 4, § 29), and mine inspectors (Wy. Const. 1889 art. 9, § 1), to modern-day judicial nominating and qualifications commissions (*see, e.g.*, Ind. Const. art. 7, § 9), and ethics commissions (*see, e.g.*, Ok. Const. art. 29, § 1). *See generally* Tarr, *supra*, at 116, 160. Of course, states have also placed many independent agencies and commissions on far less permanent footing. Indiana, for example, has by statute established several independent state boards, commissions and agencies whose members have fixed terms and thus are not accountable to the governor for official actions. These include the Auctioneer Commission (Ind. Code §§ 25-6.1-2-1, -3); the Board of Pharmacy (Ind. Code § 25-26-13-3); the Lobby Registration Commission (Ind. Code §§ 2-7-1.6-1, -2, -4); the Medical Licensing Board (Ind. Code § 25-22.5-2-1); and the Real Estate Commission (Ind. Code §§ 25-34.1-2-1, -2). Indiana is hardly unique in creating independent state boards, commissions, and agencies with fixed-term appointees. *See, e.g.*, Md.

Code § 10-205 (Maryland Food Center Authority); 34 Pa. Cons. Stat. Ann. § 301 (Pennsylvania Game Commission); Tenn. Code. Ann. § 11-4-201 (Tennessee Forestry Commission).

Since World War II, some states have attempted to consolidate executive power, *see* Sturm, *supra*, at 91, Tarr, *supra*, at 153-156, but the larger historical trend plainly favors multiple executive and administrative officials that function independently of one another. That megatrend is significant for this case. Splintered executive authority plants the seeds for inter-agency disputes. When no single executive official (such as a governor) is in a position to resolve such disagreements, courts (state and federal) become an alluring forum for arbitration.

2. The expansion of government-by-independent-agency notwithstanding, states largely (though not completely) avoid intramural litigation through the use of attorneys general, who often function as the exclusive representatives of state agencies and officials in court. *See State Attorneys General Powers and Responsibilities* 53-54, 92, 99 (Emily Myers & Lynne Ross, eds., 2d ed. 2007). That is, one advantage of having an attorney general who serves as the exclusive legal counsel for state government agencies and officials is that such an official can be the choke-point for inter-agency legal disputes. If the attorney general is unwilling to file a lawsuit by one agency against another, the division of executive power does not genuinely threaten intramural litigation. At the very least, when the attorney general has such exclusive authority, a single state

official remains electorally accountable for the decision whether to permit such lawsuits.[2]

State attorneys general, however, are not always in a position to prevent inter-agency disputes from heading to court. Indeed, the attorney general's litigation function "is not securely established in all offices, particularly in those states where agencies are free to retain independent counsel." *State Attorneys General Powers and Responsibilities*, *supra*, at 12.

The potential for inter-agency litigation arises with respect to state agencies that, like VOPA and IPAS, are neither controlled by a governor nor required to use (or obtain the consent of) a state attorney general to file a lawsuit. Both VOPA and IPAS by statute have the right to hire outside legal counsel without seeking the authorization of the attorney general. *See* Ind. Code §§ 12-28-1-2(2), (4); Va. Code Ann. § 51.5-39.2(A). The same is true in at

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[2] Often, state agencies may not even hire outside counsel without the Attorney General's consent, which is another means by which the attorney general exercises control over inter-agency legal disputes. *See, e.g.*, Ga. Code Ann. § 45-15-34; Ind. Code § 4-6-2-1; Ind. Code § 4-6-5-3; Va. Code Ann. § 2.2-507; Wash. Rev. Code Ann. § 43.10.067; *see also Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979) ("[A]gencies and officers may not hire outside counsel unless the Attorney General has consented in writing"); 1995 Va. Op. Atty. Gen. No. 241, April 3, 1995 (a Virginia state agency without specific authorization to employ legal counsel must receive prior approval from attorney general to hire private legal counsel, pursuant to statute mandating attorney general's office provide all legal services in civil matters).

least five of the other six states where the P&A system is a state agency. *See* Conn. Gen. Stat. Ann. § 46a-11; Ky. Rev. Stat. Ann. § 31.030; N.Y. Mental Hyg. Law § 47.03; N.D. Cent. Code § 25-01.3-06; Ohio Rev. Code § 5123.60.[3] This arrangement is arguably required by the DDA Act and PAIMI, which require that P&A systems have the authority to pursue "administrative, legal, and other appropriate remedies" in furtherance of their mission. *See* 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i).

Protection and Advocacy systems are not unique in this respect. Across the country, *many* state agencies are neither accountable to the governor nor beholden to the attorney general for legal representation. States create such doubly independent agencies to address a multitude of problems.

Some agencies are independent of the attorney general to insulate their executives from political pressure as they ensure that other government actors behave legally and ethically. *See, e.g.*, Cal. Gov. Code §§ 11041-11043 (exempting California's Office of Legislative Counsel from attorney general control); Fla. Stat § 11.42(2)-(3) (Florida Auditor General); Miss. Code §§ 25-4-5, 25-4-19(g) (Mississippi Ethics Commission); Nev. Rev. Stat. § 218F.720 (Nevada Legislative Counsel Bureau); 65

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[3] Alabama's Protection and Advocacy agency appears to have been established by an unpublished governor's directive; it is unclear what powers the agency possesses.

Pa.C.S. § 1106, 71 P.S. § 732-401 (Pennsylvania State Ethics Commission); Maryland Office of People's Counsel, *Who We Are*, http://www.opc.state.md.us/opc/Home/AboutUs/WhoWeAre.aspx (last visited Oct. 21, 2010).

Others oversee the behavior of non-government professionals. *See, e.g.*, Ga. Code Ann. §§ 17-12-1, 17-12-3, 17-12-4, 17-12-6 (Georgia Public Defender Standards Council); Idaho Code Ann. §§ 54-1805, 67-1406(2) (Idaho State Board of Medicine); N.M.R.A. §§ 17-101, 17-105 (New Mexico Disciplinary Board); Utah Code Ann. §§ 54-1-1, -6(1)(a)(i) (Utah Public Service Commission); La. Sup. Ct. Rule 19 (Louisiana Lawyer Disciplinary Board).

Still others provide services necessary to the public good that implicate the interests of all state officials, including attorneys general, such as the protection of civil rights, *see, e.g.*, Conn. Gen. Stat. §§ 46a-52, -54(3), -55 (Connecticut Commission on Civil Rights); representing citizen interests in crafting agency regulations, *see, e.g.*, Mo. Ann. Stat. §§ 386.700, 386.710 (Missouri Office of the Public Counsel); or resolving citizen complaints about state agencies, *see, e.g.*, Neb. Rev. Stat. §§ 81-8,241, 81-8,245 (Nebraska Office of Public Counsel). Texas uses an independent agency to ensure the effective prosecution of high-level criminal appeals. *See* Tex Gov't Code Ann. §§ 42.001, 42.003 (Texas State Prosecuting Attorney). Arizona has even created an independent agency dedicated to "restoring, maintaining, and advancing the state's sovereignty and authority over issues that affect this state and

the well-being of its citizens by taking any action it deems appropriate." *See* Ariz. Rev. Stat. Ann. § 41-401 (Arizona Constitutional Defense Council).

If *Ex parte Young* permits it, any number of circumstances could arise to lead such agencies to sue their sister agencies' leaders in federal court. State agencies, after all, already find reasons to sue sister agency officials (including their state's attorney general) in state court. *See, e.g., Perdue v. Baker*, 586 S.E.2d 606, 607 (Ga. 2003) (petition for writ of mandamus by Governor of Georgia against Georgia Attorney General); *Sec'y of Admin. and Fin. v. Attorney Gen.*, 326 N.E.2d 334, 335 (Mass. 1975) (suit by Secretary of Administration and Finance against Attorney General); *People ex. rel. Bd. of Tr. of Univ. of Ill. v. Barrett*, 46 N.E.2d 951, 953 (Ill. 1943) (mandamus suit by Board of Trustees of University of Illinois against Illinois Attorney General and Auditor of Public Accounts); *Roe v. Kervick*, 199 A.2d 834, 837 (N.J. 1964) (suit by Treasurer of New Jersey against New Jersey Area Redevelopment Commission); *Rhode Island Tpk. and Bridge Auth. v. Nugent*, 182 A.2d 427, 427 (R.I. 1962) (suit by state agency Mount Hope Bridge Authority against Rhode Island Turnpike and Bridge Authority dismissed on sovereign immunity grounds).

With regard to potential federal court claims, one can easily imagine an auditor suing a state official for violating limits on the uses of federal grants, or even to enjoin implementation of federal grant programs it believes inadequately rooted in the United States Constitution. Or, a state civil rights commission might see fit to sue a state official in

federal court for violating federal civil rights laws. *See, e.g.*, Conn. Gen. Stat. § 46a-55 ("The executive director. . . shall assign a commission legal counsel to represent the commission in any proceeding wherein any state agency or state officer is an adversary party. . . [and may represent the commission] in such other matters as the commission and the Attorney General may jointly prescribe."); 42 U.S.C. § 2000e-5(c) (providing that a state civil rights agency can bring action to enforce federal statutes).

This is but a sampling of the types of federal court claims that a ruling in favor of VOPA might enable. Such a result could frustrate the historical trend in favor of multiple administrative officials and independent agencies. States would, in short, face decisions about whether to jettison some agencies and restructure others to protect themselves from intramural federal court lawsuits. The ultimate effect would be to fetter state efforts to pursue independent, non-partisan governmental solutions to complex problems that maximize public confidence and trust. This would be particularly problematic where federal grant programs require the sort of independence that has enabled this lawsuit. States should not be faced with having to reject federal programs as the price of protecting their officials from being dragged into federal court by fellow state officials.

II. Extending *Ex Parte Young* to Allow Federal Adjudication of Intramural State Agency Disputes is Contrary to the Logical Underpinnings and Historical Background of Sovereign Immunity

VOPA has been unable to cite even one case where one state agency was permitted to sue another agency of the same state in federal court. Such cases would divide state governments against themselves and subvert the core justifications for sovereign immunity, and, as such, they are prohibited by the Eleventh Amendment.

VOPA ignores the historic and modern understandings of the nature of sovereignty by formulating the issue in this case as being whether the identity of the plaintiff should determine whether *Ex parte Young*, 209 U.S. 123 (1908), is applicable in a particular case. Pet'r's Br. at 37. It is far from clear that this is the proper way to view the issue. VOPA identifies the *Ex parte Young* solution—to name a state official rather than a state agency as the defendant in a federal court complaint—and erroneously proceeds as if the defendant's proper identity *simpliciter* was the only issue in need of resolution before federal courts could intercede in state affairs. What the *Young* conceit represents, however, is not a full resolution of a meaningless, formalistic federal pleading problem, but a limited means of addressing a profound limit on federal court jurisdiction. The real question is not the broad generality of whether *Young* turns on the identity of the plaintiff, but instead whether *Young*'s

tolerance for limited federal court intrusion into state affairs can even plausibly extend to cases where a state is suing itself. Considered in that way, and in light of the history of sovereign immunity, the question very nearly answers itself.

1. The constitutionally presupposed doctrine of sovereign immunity provides states with "nearly absolute immunity from civil lawsuits" in recognition of the special status of states in our federal system. *See* Justin Donoho, *Achieving Supreme Court Consensus: An Evolved Approach to State Sovereign Immunity*, 88 Neb. L. Rev. 760, 760 (2010). In *Young* this Court created an exception where an individual citizen sued a government official seeking prospective relief from an ongoing violation of federal law. *Young*, 209 U.S. at 167-68. In designing this exception, the court reasoned that a suit challenging the actions of state officials taken to uphold or advance an unconstitutional state statute was not really a suit against the state at all; because the state could not provide the official with the authority to perform an unconstitutional act, the act must be personal, and thus not within the ambit of sovereign immunity. *Id.* at 159-60.

Since that time, this court has repeatedly and explicitly recognized that this core justification of *Young*—that a suit against a state official for violating federal law is distinct from a suit against the state itself—is a complete fiction. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). As a result, the Court has declined to apply the exception broadly,

recognizing that to do so would magnify the fiction and conceivably allow it to consume the rule of immunity. *See, e.g., Coeur d'Alene Tribe*, 521 U.S. at 269-70; *Pennhurst*, 465 U.S. at 114 n.25.

More specifically, courts should take account of the particular impact created by allowing any given case to proceed against a defense of sovereign immunity. *Young* "requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). *Young* does not "permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer" because that "would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene Tribe*, 521 U.S. at 270. Rather, "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.* Instead of resorting to "empty formalism," courts must "examine the effect of the . . . suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." *Id.* at 281.

Here, VOPA's claims manifestly implicate the "special sovereignty interests" of states. As this court held in *Alden v. Maine*, 527 U.S. 706, 749

(1999), and the Fourth Circuit held below, one of these interests is "avoiding excessive federal meddling with [state] internal authority." *See* Pet. App. at 18a. Indeed, while the Founders split the atom of sovereignty, they did not smash it to smithereens. *See Hans v. Louisiana*, 134 U.S. 1, 14 (1890). That is to say, at the state level there is but one sovereign. State sovereignty cannot be further subdivided such that one component of state government can drag another into federal court as if the two agencies were separate states seeking to resolve a dispute in a neutral forum. As the Fourth Circuit recognized, for a federal court to referee a dispute between state agencies under *Young* would impugn the dignity of the state and raise difficult questions of political accountability. *See* Pet. App. at 19a-20a.

Along these lines, this Court held in *Pennhurst*, 465 U.S. at 106, that *Ex parte Young* does not permit suits in federal court to enjoin state officials from violating state law. The Court in *Pennhurst* sought to avoid the significant "intrusion on state sovereignty" that would result "when a federal court instructs state officials on how to conform their conduct to state law." *Id.* As the Fourth Circuit observed, "the Court recognized that federal court resolution of internal state disputes would 'conflict [] directly with the principles of federalism that underlie the Eleventh Amendment.'" Pet. App. at 19a (quoting *Pennhurst*, 465 U.S. at 106). The same conflict arises in federal-court suits by P&A systems against non-consenting state agencies under PAIMI. *See* Pet. App. at 18a-19a. Indeed, the conflict is

more pronounced when a state agency seeks federal resolution of an intramural conflict with another state agency, as it insults a state's ability to determine internal policy while raising "difficult questions of political accountability." *See id.* at 19a-20a.

2. The need to respect the special sovereignty interests of states arises from the core of the Anglo-American tradition, where the doctrine of sovereign immunity dates at least as far back as 1268, when it was considered settled that the sovereign could not be sued *eo nomine* in its own courts. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 2 (1963). The doctrine has been justified by reference to the logical anomaly that would result from the sovereign issuing or enforcing a writ against itself. *See id.* at 3 (citing 1 Pollock & Maitland, *The History of English Law* 518 (2d ed. 1898)).

The need to protect the sovereign's subjects from abuse by the sovereign and its servants eventually led to the creation of a number of exceptions to this general principle: petitions of right during the reign of Edward I, traverse during the reigns of Edward III and Edward VI, mandamus in 1615, and suits against Crown officers individually in 1703. *See id.* at 5-18 (surveying the development of exceptions to sovereign immunity in English law). Thus, an individual, a private corporation, a public corporation (such as a town), or a local government (such as a county) were permitted to seek these remedies. *See, e.g., Town of Darby v. Foxley,* (1615)

81 Eng. Rep. 370 (K.B.) (town may sue sheriff to vindicate rights granted by sovereign); Jaffe, *supra*, at 8-15 (discussing the development of suits against officers in English law to vindicate the rights of a subject); William Holdsworth, *A History of English Law* 650-55 (1938) (discussing the rights of private individuals and corporations against servants of the Crown sounding in tort and contract). Being situated as subjects of the sovereign, these groups were all capable of suing each other, entirely apart from suits against officers of the Crown. *See, e.g., County of Worcester v. Town of Evesholm,* (1686) 90 Eng. Rep. 116 (K.B.).

Notably, these remedies vindicate the rights of individuals against the sovereign, not the rights of one portion of the sovereign *vis-à-vis* another. *See generally id.* (discussing exceptions to the doctrine of sovereign immunity in terms of private individuals being able to vindicate their rights against the King and his officials); *see also* Holdsworth, *supra*, at 655-58 (discussing the relationship of the servants of the Crown to each other and to the Crown in the eighteenth century); *see generally* Jaffe, *supra*, at 1. Nor is this surprising, as English courts recognized that protecting the public from oppression "must not fetter unduly the free action of the executive government." *See* Holdsworth, *supra*, at 657. Subjecting the sovereign's internal disputes to judicial control would clearly have fettered the executive and interfered with effective government.

When the several states won their independence from England in the American Revolution, they each

individually acceded to the full measure of this immunity. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Indeed, one of the core concerns of the ratification debates dealt with whether the creation of a federal sovereign "above" the states would subject the states to suit. *See Alden v. Maine*, 527 U.S. at 717-19. The Constitution's proponents assured the states that their sovereign immunity to suit would not be damaged by the extension of Article III jurisdiction to suits between a state and a citizen of another state. *See The Federalist* No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.") (emphasis added).

Despite these assurances, a mere five years after ratification the Court read the Constitution to negate the states' sovereign immunity in federal suits brought by citizens of other states. *See Chisholm v. Georgia*, 2 Dall. 419 (1793) (holding that the language granting the Supreme Court jurisdiction in controversies between a state and a citizen of another state was inconsistent with sovereign immunity to such suits). This decision provoked an immediate backlash culminating in the enactment of the Eleventh Amendment, which prevented the judicial power of the United States from extending to suits in law or equity against a

state by a citizen of another state. *See Alden*, 527 U.S. at 720-24 (discussing the public condemnation of the majority decision in *Chisholm* and the enactment of the Eleventh Amendment). The Court has since recognized that, while the states share some of the full authority of sovereignty with the federal government, each state retains the full dignity of a sovereign, including immunity to suit. *See Blatchford*, 501 U.S. at 779.[4]

After the Eleventh Amendment overruled *Chisholm*, *see Alden*, 527 U.S. at 723, the Court allowed suits by private individuals and corporations to proceed against state officials in their individual capacities under limited circumstances. *See, e.g., Poindexter v. Greenhow (Virginia Coupon Cases)*, 114 U.S. 170 (1885) (allowing private individual to sue state officer based on the reasoning that unconstitutional law could not provide sovereign immunity); *Bd. of Liquidation v. McComb*, 92 U.S. 531 (1875) (suit by private individual compelling performance of a non-discretionary duty by a state

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[4] The Court has consequently given a broad reading to state sovereign immunity and upheld immunity claims outside of the literal text of the Eleventh Amendment. Sovereign immunity has thus barred suits against states by their own citizens, federal corporations, foreign nations, and Indian tribes. *See generally Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (sovereign immunity applicable to suits by Indian tribes); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (sovereign immunity applicable to suits by foreign nations); *Smith v. Reeves*, 178 U.S. 436 (1900) (sovereign immunity applicable to suits by federal corporations); *Hans v. Louisiana*, 134 U.S. 1 (1890) (sovereign immunity applicable to suits by citizens of sued state).

official via mandamus); *Osborn v. Bank of United States*, 22 U.S. 738 (1824) (allowing private tort suit to proceed against state official who committed tort pursuant to unconstitutional law).

These exceptions were eventually synthesized in *Ex parte Young* to allow suits against state officials for prospective relief. *See Young*, 209 U.S. at 150-58 (discussing nineteenth century cases allowing and disallowing suit against state officials). *Young* must be understood in context, *i.e.*, with reference to the English doctrine of sovereign immunity confirmed by the Eleventh Amendment. *Cf. Alden*, 527 U.S. at 720-24 (discussing the public condemnation of the majority decision in *Chisholm* and the enactment of the Eleventh Amendment to preserve the sovereign immunity of the states). To read *Young* in context is to understand that, for all its fiction, *Young* does not enable lawsuits that would have been "anomalous and unheard-of" to the Founders, *Hans,* 134 U.S. at 16, a characterization which most certainly applies to suits by a state agency against officials of another agency of the same state.

3. Ignoring this tradition, Petitioner characterizes this suit as a "classic example" of the narrow *Young* exception. Pet'r's Br. at 35-36. VOPA cannot, however, cite to a single case allowing a state sovereign to sue itself in federal court. *See* Pet'r's Br. at 44. Nor can Petitioner even cite any English cases supporting such a bizarre result. *See* Pet'r's Br. at 45-48. Instead, VOPA cites cases allowing suits against state officials in federal court by cities, corporations, counties, or individuals, and

intramural suits between the same.[5] These cases are not relevant because they do not implicate the unique sovereign dignity of states. VOPA seeks to dodge the difficult issues that state sovereignty implies by arguing that, because it was created by the state like a town or corporation, it should be treated like a political subdivision for purposes of suing state officials. *See* Pet'r's Br. at 44-50. But if anything is clear in this case, it is that VOPA *is* the state, period—as VOPA itself has conceded elsewhere. *See* Pet'r's Br. at 17 ("Virginia legislatively established petitioner VOPA in its current form as an 'independent state agency'"); *see also Ind. Prot. & Advocacy Servs.*, 603 F.3d at 367 (confirming that Indiana's VOPA analogue, Indiana Protection and Advocacy Services, is a state agency). It should be equally clear that sovereign immunity would lose all significance if federal courts were to treat state agencies as political subdivisions whenever sovereignty interferes with federal jurisdiction.

VOPA, as an arm of state government, cannot use rights designed to protect the people from their government against another arm of state

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[5] Petitioner's references to other federal cases it has been involved in are irrelevant. *See* Pet'r's Br. at 41 n.8. All such cases took place in the Fourth Circuit, and the Fourth Circuit has rejected Petitioner's expansive reading of *Young*. Pet. App. at 18a-21a. *Amici* are aware of only one other case in which a state agency has sued another state agency in federal court, which is also on appeal to this court. *See Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 368-70 (7th Cir. 2010) (en banc), petition for cert. filed, No. 10-131 (July 21, 2010).

government without injuring the state's sovereign dignity. *Cf.* Jaffe, *supra*, at 8-15 (discussing the development of suits against officers in English law to vindicate the rights of the governed against the government). It is hard to see how the Eleventh Amendment could be said to create "real limitations" on a federal court's jurisdiction if a state may be haled into court not only by citizens, corporations, and local governments, but also by its own appendages. *See Coeur d'Alene Tribe*, 521 U.S. at 269-70. VOPA's claim is merely another attempt to convert the *Young* exception into an "empty formalism" sacrificing the Eleventh Amendment to the "elementary mechanics of captions and pleading" of the sort this court has historically rejected. *See id.*

If it was anathema to the Founders for states to be dragged by their own citizens into the courts of the "higher sovereign," *see Nevada v. Hall*, 440 U.S. 410, 418 (1979), it surely would have been beyond all conception that political rivals within state governments could drag one another into federal court. *Cf. Hans*, 134 U.S. at 16 (rejecting a suit in federal court against Louisiana by a citizen of Louisiana on sovereign immunity grounds because the Constitution did not enable such "anomalous and unheard-of" proceedings). If the Founders thought to the contrary, presumably they would have made express provision for such suits in Article III, as they did for "Controversies between two or more states" U.S. Const. art. III, sec. 2.

It is inherent in the principle of sovereign immunity embodied by the Eleventh Amendment that a state may not sue itself in federal court. If sovereign immunity and the Eleventh Amendment impose real limits on federal jurisdiction, then *Young* cannot be extended to allow federal adjudication of intramural disputes between state agencies. To allow such a lawsuit would ignore not only the logical underpinnings of both doctrines, but also the historical backgrounds informing their application and this Court's stated understanding of their scope.

CONCLUSION

The Court should affirm the decision below.

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Dated: October 21, 2010

AMICUS CURIAE BRIEF

No. 09-529

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
by Its Office for Protection and Advocacy,

Petitioner,

—v.—

JAMES W. STEWART, III, in His Official Capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in Her Official Capacity as Director, Central Virginia Training Center, and VICKI Y. MONTGOMERY, in Her Official Capacity as Acting Director, Central State Hospital,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST of *AMICI CURIAE* and SUMMARY OF ARGUMENT[1]

Amici curiae listed in the Appendix are scholars of constitutional law and the federal courts who hold a range of views as to how to understand state sovereign immunity, including whether such immunity is rooted in the Constitution or the common law; the appropriate circumstances in which Congress may abrogate that immunity; the proper application of the Eleventh Amendment; and the nature and scope of relief that should be available under *Ex parte Young*, 209 U.S. 123 (1908). *Amici* come together in this case, though, to explain how the doctrine of *Ex parte Young* strikes a carefully calibrated balance between the supremacy of federal law and the separate sovereignty of the states, a balance that is jeopardized by the Court of Appeals' holding barring a state-created agency —acting under state authority—from pursuing the same relief under *Ex parte Young* that would be available to an otherwise similarly situated private entity.

First, careful review of this Court's jurisprudence reveals that the Supremacy Clause principles for which *Ex parte Young* has come to stand have at their core the assumption that state sovereignty is not implicated whenever state officers are continuing to act in violation of federal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

law. As Justice Peckham explained in *Young*, "[t]he act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. Put another way, because the state *qua* sovereign has no authority to empower its officers to violate federal law, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), regardless of whether the plaintiff is an individual, a private corporation, or a public agency. Because relief under *Ex parte Young* therefore turns solely on whether the defendant-officer's ongoing conduct violates federal law, all that is required for relief, as Justice Scalia has explained, is a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original)). Thus, where relief under *Ex parte Young* is otherwise appropriate, there is no sovereign whose special interests need protecting on the defendant's side of the lawsuit.

Second, to the extent that VOPA is a "public" agency, its existence reflects Virginia's sovereign (and statutory) choice to create a new "arm of the state." And that conclusion in turn triggers separate strands of this Court's jurisprudence that recognize and protect the special sovereignty interests of the states on *both* sides of the litigation, and not just as defendants. To that end, this Court has recognized that sovereign immunity does not bar suits by *other* states, *see, e.g.*, *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), that different considerations may factor into traditional standing analysis when states are plaintiffs, *see, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and that, to protect the unique sovereignty interests of the states, many interstate bodies should be excluded from the sweep of the Eleventh Amendment, *see, e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979).

In addition, this Court's jurisprudence also recognizes the extent to which state sovereignty is adequately protected by providing the state with meaningful (and wholly volitional) choices in structuring their conduct. *See, e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst I*), 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). In the specific context of the Eleventh Amendment, this Court has stressed "the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not ... a State's actual preference or desire, which might,

after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). Here, Virginia chose both to accept funds in the first place, and to use those funds to create a public agency to administer the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51, knowing that relief under *Ex parte Young* has always been available to enforce Spending Clause statutes. Sovereign immunity, as this Court has stressed, is designed to protect the states' role in our federal system, not to "permit States to achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. By choosing to accept funds under the PAIMI Act and by creating a state agency with the authority to enforce federal law, Virginia has exercised its sovereignty—an exercise that is itself entitled to respect. Thus, although *amici* agree that states are entitled to special consideration whenever their sovereign interests are implicated in litigation in the federal courts, this Court's jurisprudence suggests that any such interests in this case appear on the plaintiff's side of the litigation, not the defendant's.

ARGUMENT

I. SUITS FOR FEDERAL INJUNCTIVE RELIEF AGAINST STATE OFFICERS DO NOT IMPLICATE STATE SOVEREIGNTY REGARDLESS OF WHETHER THE PLAINTIFF IS A PRIVATE OR PUBLIC ENTITY

a. *Ex parte Young* Held That the Eleventh Amendment Does Not Bar a Suit for Federal Injunctive Relief Against a State Officer

As then-Justice Rehnquist wrote for this Court 36 years ago,

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Edelman v. *Jordan*, 415 U.S. 651, 664 (1974). At the heart of *Ex parte Young* and its companion case, *Gen. Oil Co.* v. *Crain*, 209 U.S. 211 (1908), is the premise that "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land." *Alden* v. *Maine*, 527 U.S. 706, 747 (1999).

As Justice McKenna explained in *Crain*, "Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers." 209 U.S. at 226; *see also Ex parte Young*, 209 U.S. at 159 ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.").

Ex parte Young and *Crain* thereby solidified as constitutional law a principle that had been repeatedly suggested in prior cases, *i.e.*, "that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of [the Eleventh A]mendment." *Smyth* v. *Ames*, 169 U.S. 466, 518–19 (1898); *see also Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 389–90 (1894); *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 9 (1891); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824) (Marshall, C.J.) (rejecting the argument that "a void act can afford any protection to the officers who execute it"); *cf. United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and

to observe the limitations which it imposes upon the exercise of the authority which it gives.").

In that regard, *Ex parte Young* was nothing more than an application of the conclusion the Court had already reached in *McConnaughy*, *Reagan*, and *Smyth*, albeit one that was only the more significant in light of the Court's broad construction of the Eleventh Amendment in *Hans* v. *Louisiana*, 134 U.S. 1 (1890). *See generally* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (highlighting the relationship between *Hans* and *Young*). Nevertheless, the animating idea behind *Ex parte Young* is a "basic principle of federal law," *Coeur d'Alene Tribe*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment), that "has become bedrock," Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247, 247 (Judith Resnik & Vicki C. Jackson eds., 2009); *see also* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 908–12 (2000) (describing the significance of *Ex parte Young* in the context of modern doctrine).

More than that, *Ex parte Young* has proved "indispensable to the establishment of constitutional government and the rule of law." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 14 (6th ed. 2002). Simply put, "The doctrine of *Ex parte Young* . . . ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

b. Ex parte Young Holds That the Supremacy Clause Divests State Officers of Any Authority To Violate Federal Law, and Must Be Prospectively Enforceable

In recognizing such a "necessary exception to Eleventh Amendment immunity," *id.*, the *Ex parte Young* Court relied, as *Smyth* v. *Ames* had before it, on the Supremacy Clause of Article VI. *See, e.g.*, *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."); *Smyth*, 169 U.S. at 527 ("No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case, for that would make the state legislature the final judge of the validity of its enactment . . . ."). As Justice Peckham explained in *Young*,

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)). Thus, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68; *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1154–55 (1989) (explaining the constitutional significance of *Ex parte Young*'s rationale).

That the availability of relief under *Ex parte Young* is required to vindicate the Supremacy Clause is perhaps nowhere better reflected than in those cases in which this Court has declined to apply the 1908 decision. In *Pennhurst II*, for example, the question was whether *Ex parte Young* could be invoked to pursue injunctive relief against state officers for violations of *state* law. Writing for the Court, Justice Powell answered that question in the negative. *See Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 103–06 (1984). In his words, "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106; *see also* Jackson, *supra*, at 990 ("[In *Pennhurst II*], it was not history and remedial traditions, but rather the supremacy of federal law, that justified *Ex parte Young* actions for injunctive relief under federal law but not for injunctive relief under state law.").

To similar effect, *Edelman* v. *Jordan*, which reaffirmed *Ex parte Young* within its longstand-

ing, necessary bounds but declined to extend it to claims seeking retrospective relief, was expressly grounded in the Supremacy Clause. *See, e.g.*, *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 664–68. As *Ex parte Young* itself suggested, the supremacy of federal law is not as squarely threatened in cases where an ongoing violation of federal law was not at issue. *See, e.g.*, *Ex parte Young*, 209 U.S. at 192 ("There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state." (emphasis omitted)).

In short, none of these cases disrupt the analytical heart of *Ex parte Young*—that a state's "special sovereignty interests" are not implicated when plaintiffs seek federal injunctive relief against state officers.[2]

[2] The conclusion that it is these fundamental principles—and only these—that govern the scope of *Ex parte Young* is not called into question by this Court's decision in *Coeur d'Alene*. Although Justice Kennedy's opinion in that case suggested that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction," 521 U.S. at 270 (opinion of Kennedy, J.), the three other Justices whose votes formed the majority declined to endorse such an approach.

Subsequent cases confirm that *Young*'s central principles survived *Coeur d'Alene* intact. In *Verizon*, for example, Justice Scalia specifically rejected Maryland's suggestion that

c. Thus, There is No Basis for Conditioning Relief Under *Ex parte Young* on Whether the Plaintiff is a Private or Public Entity

Because *Ex parte Young* stands for the Supremacy Clause-based principle that states have no authority to empower their officers to continue to act in violation of federal law in any circumstance, this Court has never suggested that its applicability turns on case-specific considerations such as the identity of the plaintiff. Rather, as Justice Scalia has explained, "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original)).

To that end, this Court has routinely applied the rule of *Ex parte Young* without any special

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Coeur d'Alene had fundamentally altered the nature of *Ex parte Young* actions, reiterating that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," 535 U.S. at 646, and instead turns only on the traditional factors. *See also Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431 (2004) (holding that an action to enforce a consent decree could be brought under *Ex parte Young*, without citing *Coeur d'Alene*). *See generally* Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 42–51 (1998) (arguing for, and justifying, a limited reading of *Coeur d'Alene*).

comment where the plaintiff is a private corporation. *See, e.g.*, *Verizon*, 535 U.S. 635; *S. Covington & Cincinnati St. Ry. Co.* v. *City of Covington*, 235 U.S. 537 (1915). Such decisions reflect and enforce the principle underlying the *Ex parte Young* doctrine, *i.e.*, that it is the need to enjoin ongoing violations of federal law—and not any concern with whom the plaintiff might be—that warrants treating persons responsible for such ongoing violations as private individuals, not alter egos of the state.

"Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 293 ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar."). This Court's rejection of any notion that only natural-born persons may invoke *Ex parte Young* makes eminent good sense, because the threat to federal supremacy has nothing to do whatsoever with the identity of the plaintiff. Any ongoing violation of federal law by a state officer threatens the supremacy of that law—and of federal authority writ large. *See, e.g.*, Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126–32 (1996) (noting the continuing significance—and vitality—of *Ex parte Young* after *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996)). In the same vein, the state *qua* sovereign is unaffected by any distinction with regard to the nature or legal status of the plaintiff; *any* "special sovereignty interest" is

vitiated by the *defendant*'s ongoing violation of the plaintiff's federal rights, regardless of who the plaintiff is.

II. As a Public, State-Created Agency, VOPA Acts as the Sovereign, and Exercises that Sovereignty in Choosing to Pursue Relief Under *Ex parte Young*

To the extent that VOPA is a "public" agency, its existence reflects Virginia's sovereign (and statutory) right to create a new "arm of the state." That conclusion, in turn, triggers separate strands of this Court's jurisprudence that recognize and protect the special sovereignty interests of the states on both sides of the litigation, and not just as defendants.

a. As a "Public" Agency, VOPA Acts With Sovereign Authority

In ascertaining whether individual actors are in fact the "state," this Court has been careful to distinguish between the different constitutional provisions for which that determination matters. Thus, whereas this Court's jurisprudence has recognized a relatively broad definition of "state action" sufficient to trigger the constraints of the Fifth and Fourteenth Amendments, *see, e.g.*, *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–98 (2001); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–91 (1995), the test under the Eleventh Amendment has been considerably more exacting. As Justice Stevens explained in *Lake Country Estates*,

> It is true, of course, that some agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

440 U.S. at 400–01 (footnote omitted).

Thus, this Court has refused to extend sovereign immunity to counties, *see, e.g.*, *N. Ins. Co. of N.Y., Inc.* v. *Chatham County*, 547 U.S. 189, 193 (2006), municipalities, *see, e.g.*, *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003), and most inter-state agencies, *see, e.g.*, *Hess*, 513 U.S. 30; *Lake Country Estates*, 440 U.S. 391. Instead, an entity must be an "arm of the state," at least partly as a matter of *state* law, to qualify for Eleventh Amendment protection. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (noting that whether an entity is an "arm of the state" for Eleventh Amendment purposes "depends, at least in part, upon the nature of the entity created by state law"); *see also Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997) ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law.

But that federal question can be answered only after considering the provisions of state law that define the agency's character.").

The narrower standard this Court has embraced under the Eleventh Amendment specifically reaffirms the relationship between sovereign immunity and the special sovereignty interests of the states, which are not implicated in suits against other actors, no matter their connection to state authority or their treatment as state actors under other constitutional provisions. *See, e.g.*, *N. Ins. Co. of N.Y.*, 547 U.S. at 193 ("A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law."). The negative implication of these cases is that entities that *are* "arms of the state," and therefore entitled to Eleventh Amendment protections, are entities with their own special sovereignty interests.

Notwithstanding this conclusion, the Court of Appeals did not even consider whether VOPA *is* an "arm of the state" under Virginia law, and, how, if at all, that conclusion might factor into its ability to pursue federal injunctive relief against state officers under *Ex parte Young*. *Cf. Cash* v. *Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (analyzing whether a county school board is an "arm of the state" under North Carolina law). In short, in focusing on the special sovereignty interests of the state through its defendant-officers, the Court of Appeals neglected the equally—if not more—significant possibility

that the plaintiff-agency also has special sovereignty interests worth vindicating.

b. This Court Has Consistently Recognized the Special Sovereignty Interests of States and State Agencies as Plaintiffs

If VOPA is in fact an "arm of the state," it would follow that it, too, is protected by the same special sovereignty interests that this Court has repeatedly recognized in cases where the states themselves are litigants. And, although the Fourth Circuit did not consider this possibility, it bears emphasizing that such interests often arise in cases in which states are *plaintiffs*, and not just defendants.

For example, this Court has consistently held that the Eleventh Amendment does not protect states from suits by other states. *See, e.g.*, *Texas* v. *New Mexico*, 482 U.S. 124, 130–31 (1987); *see also Rhode Island*, 37 U.S. (12 Pet.) 657. Although the Court has never had occasion to address the issue, the same logic would presumably apply where the plaintiff was an "arm of the state" for Eleventh Amendment purposes, rather than the state itself. And whatever the underlying rationale for these decisions, it cannot be gainsaid that the special sovereignty interests of the states cut both ways in such litigation.

To similar effect, this Court recently reiterated the time-honored principle that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518. As Justice Stevens there explained, "there is a

critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Massachusetts* v.] *Mellon*[, 262 U.S. 447 (1923)] prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id.* at 520 n.17 (quoting *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 447 (1945)).

Whatever the sweep of this Court's decision in *Massachusetts* v. *EPA*, it reflects at a minimum the notion that special sovereignty interests follow states—and the arms thereof—regardless of the side on which they appear in litigation. It is therefore necessarily incomplete to account for the special sovereignty interests of the state through an official *qua* defendant, without taking into account the very real possibility that equally strong—if not stronger—interests appear on the plaintiff's side, as well. Indeed, the irony of the Court of Appeals' analysis in this case is its invocation of sovereignty considerations on the part of a defendant official (who, according to *Ex parte Young*, does *not* act as the state), concomitant with its failure to consider those concerns on the part of the plaintiff (who, under Virginia law, may well be the state). In short, with regard to the special sovereignty interests of the states, more thoroughgoing analysis suggests that the Court of Appeals might have had the relevant considerations backwards.[3]

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[3] In addition, the Fourth Circuit's decision did not consider the potentially invasive role federal courts would have to play in deciding, on a case-by-case basis, whether individual entities are "public" or not under state law. *Cf. Hughes* v. *Region VII Area Agency on Aging*, 423 F. Supp. 2d

c. Virginia Exercised its Sovereignty Both by Accepting Funds Under the PAIMI Act and by Creating a Public Agency Empowered to Enforce the Federal Statute

It is beyond question that Spending Clause statutes are enforceable under *Ex parte Young* to the exact same extent as any other federal law—and always have been. *See, e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 346–49 (1979); *see also Frazar* v. *Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002) (expressly rejecting the argument that Spending Clause statutes are not enforceable to the same extent as other federal laws under *Ex parte Young*), *rev'd on other grounds sub nom. Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431 (2004); *Mo. Child Care Ass'n* v. *Cross*, 294 F.3d 1034, 1040–41 (8th Cir. 2002) (same); *Westside Mothers* v. *Haveman*, 289 F.3d 852, 861 (6th Cir. 2002) (same); *Antrican* v. *Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (same). As such, "once a State elects to participate, it must comply with the requirements of [the statute]." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). By accepting funds under the PAIMI Act, Virginia knowingly subjected its officers to prospective compliance with the federal law. Moreover, Virginia's concession that the PAIMI Act would be enforceable against state officers in

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708 (E.D. Mich. 2006) (undertaking exhaustive analysis of the facts and of Michigan state law in ascertaining whether an area agency on aging (AAA) is public or private under a federal statute similar to the PAIMI Act); *Tex. Boll Weevil Eradication Found., Inc.* v. *Lewellen*, 952 S.W.2d 454 (Tex. 1997) (noting the inherent complexities in determining whether certain entities are public or private entities under state law).

an *Ex parte Young* action brought by *private* plaintiffs further buttresses the conclusion that the state understood the consequences of accepting federal funds—that its officers would be bound to abide by the statute, and would be subject to injunctive relief if they failed to do so.

Thus, whether or not acceptance of federal funds under the PAIMI Act constituted a waiver of Virginia's sovereign immunity (a point that is not at issue in this case, and on which *amici* express no view), there is no question that Virginia knew that, under extant doctrine, its officers would be subject to injunctive relief under *Ex parte Young* were they to violate the Act.

In addition, and separate from the threshold decision whether to accept funds under the Act, the PAIMI Act also invests states with a choice of how to use those funds, *i.e.*, whether to create a public or private agency to monitor the state's compliance with the statute. In an analogous context, this Court has held that sovereign immunity is not meant to "permit States to achieve unfair tactical advantages," emphasizing that "an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides*, 535 U.S. at 620. To be sure, choosing to create a public—rather than private—agency is not the kind of litigation choice on which the Court relied in finding a waiver of sovereign

immunity in *Lapides*.[4] Nonetheless, the considerations are comparable, for this Court in *Lapides* rejected the possibility of a regime where a state might manufacture sovereign immunity simply by choosing among alternative forums. The same should hold for the choice whether to create a public or private agency with federal funds to enforce a federal statute.

* * *

The Court of Appeals' decision represents an arbitrary and ill-conceived variation on well-established, workable doctrinal rules, and jeopardizes the careful balance that this Court's sovereign immunity jurisprudence has struck between the supremacy of federal law and the sovereignty of the states. *Amici* agree that states are entitled to special consideration whenever their sovereign interests are implicated in litigation in the federal courts. In this case, though, any such interests appear on the plaintiff's side of the litigation, not the defendant's.

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[4] Perhaps ironically, there is no reason to believe that Virginia chose to create a public agency (rather than a private one) *because* that entity would have less authority and less of an ability to effectuate the goals of the PAIMI Act. Although in one sense that fact further distinguishes this case from *Lapides*, it simultaneously reinforces the extent to which the Court of Appeals did not pay proper respect to Virginia's sovereign interests.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-529

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
BY ITS OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES W. STEWART, III, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES OF THE COMMONWEALTH OF VIRGINIA, DENISE D. MICHELETTI, IN HER OFFICIAL CAPACITY AS DIRECTOR, CENTRAL VIRGINIA TRAINING CENTER, AND VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL,

Respondents.

On Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 31, 2010

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INTEREST OF *AMICUS CURIAE*[1]

The National Disability Rights Network (NDRN) is the membership association of federally-sanctioned protection and advocacy systems (P&As). In landmark legislation, Congress tasked P&As with protecting the rights of people with disabilities. P&As are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. Eight of NDRN's members are independent state agencies, including the petitioner in this case, the Virginia Office for Protection and Advocacy (VOPA), an independent state agency established by the Commonwealth of Virginia.

Through their efforts, P&As are frequently able to prevent mistreatment of particular individuals and also to achieve systemic reforms that impact thousands of people. *See generally* Nat'l Disability Rights Network, 2008 Annual Report: Protection and Advocacy for Individuals with Mental Illness (July 2009), *available at* http://www.ndrn.org/pub/AnnRpt/2008/2008PAIMIAnnualReport.pdf.

In states such as Virginia where P&As are public entities, the Fourth Circuit's decision will eviscerate the ability of P&As to carry out the mission Congress intended – protecting individuals with developmental disabilities and mental illnesses

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

against abuse, neglect, and other deprivations of their rights. It will have the same effect in any other states that elect to designate the P&As as public entities, rather than as private non-profits. Because the ability to challenge state entities in court is critical to a P&A's ability to protect the legal rights of persons with disabilities, NDRN and its members have an interest in this case and believe that their views may assist the Court in resolving the issues before it.

SUMMARY OF ARGUMENT

Conferring Eleventh Amendment immunity on states from suits by public agency P&As for access to information would prevent those P&As from doing their job. In 1975, Congress created independent Protection and Advocacy organizations after making explicit findings that individuals with developmental disabilities were subject to widespread abuse in state-operated facilities. With the passage of the Developmentally Disabled Assistance and Bill of Rights Act (the "DD Act"), Pub. L. No. 94-103, 89 Stat. 486 (1975), originally codified at 42 U.S.C. § 6041 - 6043 and currently at 42 U.S.C. §§ 15041 - 15045, some of the country's most vulnerable citizens gained, for the first time, a nationwide network of advocates empowered to act on their behalf.

A decade later, Congress broadened the scope of those whom P&As protect. Having investigated conditions in psychiatric institutions and found that the abuse of individuals with mental illness was shockingly widespread, Congress enacted what is

now the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"),[2] Pub. L. No. 99-319, 100 stat. 478 (1986) codified at 42 U.S.C § 10801, *et seq.*, which expanded the P&As' role to include not just those with developmental disabilities, but also those with mental illness.

To ensure that each P&A has the power to uncover abuse and neglect and effectively advocate to end that abuse and neglect, federal law requires that all P&As have three critical features. First, every P&A must be independent of any state agency that provides treatment, services, or habilitation to persons with developmental disabilities or mental illnesses. Second, every P&A has a federal right of access to records, facilities, and individuals to allow for unimpeded investigations of suspected instances of abuse and neglect. And third, every P&A is authorized to pursue legal, administrative, and other appropriate remedies to protect the rights of individuals with disabilities and mental illnesses.

Because these powers are critical to the ability of P&As to carry out their federal mandate, Congress required *all* P&As to have them. However, because Congress did *not* require that all P&As take the same form, in some states the P&A is a private, non-profit organization, and in others it is an independent state agency. Yet that distinction should not have any effect on the federal powers of

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[2] This act was originally titled the Protection and Advocacy for Mentally Ill Individuals Act and was referred to as the "PAMII" act.

the P&As. The Fourth Circuit's flawed interpretation of this Court's Eleventh Amendment jurisprudence would severely curtail the ability of P&As to support the rights of those with disabilities in those states that elected to designate a state entity P&A rather than a private non-profit.

ARGUMENT

I. ABUSE AND NEGLECT OF INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES AND MENTAL ILLNESS

Congress created the P&As in response to a long history of mistreatment of individuals with disabilities. The facts in this case illustrate the types of suspected abuse and neglect to which these individuals have often been subject and that P&As now investigate. This case involves investigations into suspected abuse of three individuals in institutions owned and operated by the state of Virginia.

> In 2006, a man with mental illness and intellectual disabilities died while a resident at the Central Virginia Training Center. He had a history of ingesting non-edible items. When he began to show symptoms of bowel obstruction, he was transported to the hospital. Surgeons conducted exploratory surgery and removed two latex gloves from his intestines. He later died.
>
> In 2007, a man with intellectual disabilities, who resided at the same training center, was

> assaulted by another resident. Staff saw the assaulted resident running from his room covered in blood. When staff went to the room, they discovered several pieces of human ear on the floor and a large amount of blood.
>
> Also in 2007, a man with mental illness died while a resident at the Central State Hospital. He had been held in some form of mechanical restraint for thirty-three hours before finally being released. About thirty minutes after he was released, staff entered his bedroom to again restrain him. He complained he couldn't breathe. Staff attempted to revive him, but he was later pronounced dead.

Complaint ¶¶ 13, 19, 25, *Virginia v. Reinhard*, No. 07 Civ. 00734 (E.D. Va. Dec. 3, 2007).

VOPA, the agency designated by Virginia to fulfill the Congressional mandate to investigate abuse and neglect of individuals with disabilities in Virginia, opened investigations into each case to find out whether these events were a result of abuse or neglect and, if so, how to prevent other residents from being similarly abused and neglected. Unfortunately, those investigations have been stymied by the obstinacy of the relevant state institutions to provide the necessary information.

The incidents that occurred at the Virginia facilities are not isolated. Indeed, they are a stark reminder of this country's long, tragic history of failing to protect the rights of citizens with

disabilities. *See e.g.*, Maurianne, Adams et. al., *Teaching for Diversity and Social Justice*, Perspectives on the Historical Treatment of People with Disabilities, Appendix 14C (2d ed. 2007).

For decades, many individuals with disabilities were warehoused in institutions, primarily run by the states. The abuse and neglect they lived with eventually led to reform. In 1972, an investigative reporter in New York visited Willowbrook, a state-run institution for children and adults with developmental disabilities. The reporter described walking into the institution and encountering children, twisted and deformed from untreated medical conditions, lying, nearly naked, in their own feces. S. Rep. No. 94-160, at 29 (1975).

In response to the public outrage generated by the mistreatment at Willowbrook, Congress began to investigate the conditions in American institutions for individuals with developmental disabilities and discovered that the conditions in Willowbrook were not unique. The Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard from doctors who described conditions in many institutions as "hazardous to psychological integrity, to health and in some cases even to life." S. Rep. No. 93-1169, at 33. Other witnesses before the Senate Subcommittee described this horrific state of affairs with bone-chilling detail. In one institution, two hundred children were packed into a single room with only three or four staff members to supervise them. *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973:*

Hearing on S. 427 and S. 458 Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Public Welfare, 93d Cong. 562 (1973). In another, fifty-four young men were forced to share nine plates and spoons at every meal. S. Rep. 94-160, at 30.

The Senate Staff Report concluded that the testimony "exposed overwhelmingly that totally unacceptable conditions still prevail in many public and other facilities for the developmentally disabled." S. Rep. 93-1169, at 29. The Committee further found that:

> Many institutions can best be described as "hopeless places" dedicated to custodial care of lifelong residents. All too often these institutions are far removed from urban areas and represent an effort of society to forget its obligations to their residents. Frequently they have little or no outreach and are quite unconnected with the existing community facilities. They generally lack any commitment to change . . . All these circumstances tend to generate environments in which residents can be neglected and even abused, and which unfortunately often lead to deterioration of the residents' physical and mental condition.

Id. at 29-30.

II. THE CREATION OF THE P&A SYSTEM

In response to this national problem, Congress enacted the DD Act with two goals: to improve care

in residential facilities and to minimize inappropriate, involuntary confinement in those facilities. S. Rep. 93-1169, at 1-2. In setting these goals, Congress drafted a "Bill of Rights" for those with developmental disabilities living in residential facilities. These included (1) appropriate treatment; (2) the provision of nourishment; (3) appropriate medical and dental care; (4) prohibition on the use of physical restraint unless medically necessary; (5) permission for relatives to visit at reasonable hours without prior notice; and (6) compliance with applicable fire and safety standards. DD Act, Pub. Law No. 94-103 17, currently codified at 42 U.S.C. § 15041, *et seq.*

To ensure these rights were secured, Congress created the Protection and Advocacy system. Each state that wished to take advantage of any federal funding related to the DD Act was required to designate an independent P&A. Each P&A was required to "(A) have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, and (B) be independent of any State agency which provides treatment, services, or habilitation to persons with developmental disabilities." 42 U.S.C. § 6042 (1975) (current version at 42 U.S.C. § 15043(a)(2)).

For the first time in our nation's history, the welfare of our most vulnerable citizens was no longer purely a state concern.

Over the next decade, it became increasingly apparent that the DD Act was not sufficient. Although federal law gave P&As some tools to investigate and address many of the abuses occurring in institutions for those with developmental disabilities, P&As lacked a guaranteed right of access to people, records, and institutions. In order to conduct a proper investigation into alleged abuse or neglect, a P&A needed the ability to read investigation reports, to see facilities from the inside, and, most importantly, to talk to the people whose rights were being violated. Accordingly, when Congress reauthorized the DD Act in 1984, it added a guaranteed federal right for P&As to access medical reports for individuals with disabilities, 42 U.S.C. § 15043(a)(2)(I), (J), and the individuals themselves, *id.* § 15043(a)(2)(H).

Many of the same abusive environments that had existed in institutions for those individuals with developmental disabilities also existed in institutions for people living with mental illness. In 1985, Congress held hearings related to reports of abuse in state psychiatric hospitals. In connection with the hearings, Senate staff investigated 31 facilities in 12 states and conducted approximately 600 interviews over a period of nine months. The Senate staff report concluded that as a result of the DD Act, individuals with developmental disabilities living in residential facilities held "a clear advantage" over those living with mental illness. *Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped*

of the S. Comm. on Labor & Human Resources and Subcomm. on Labor, Health & Human Services, Education & Related Agencies of the S. Comm. on Appropriations, 99th Cong. 710 (1985) (statement of Harold Cockerham).

Every psychiatric institution responding to the Senate's request for information replied with documented incidents of abuse at the institution within the last year that resulted in disciplinary action against staff. *Id.* at 736. Not only did the Senate staff find widespread abuse of individuals with mental illness, but it found that, although the Justice Department had the authority to investigate and sue to prevent abusive situations, that authority was rarely used. *Id.* at 711.

During the hearings, the Senate also heard story after story describing the horrible neglect and mistreatment experienced by those with mental illness in institutions. These stories included:

> A twelve-year old boy who had been beaten and cut by a staff member so badly that he lost his hearing. The individual responsible for abusing the boy was originally allowed to continue working and later put on leave with pay. "There was a joke going around the State facility that you could beat up a child and get a year off with pay." *Id.* at 13-18.
>
> Non-ambulatory children with severe disabilities "punished" by having their wheel chairs forced into a corner, with furniture

> wedged up against them, forcing them to stare at the wall. *Id.* at 32.
>
> A four-year-old boy left unattended and improperly restrained in a wheelchair only to die by choking to death in his straps. *Id.* at 42-43.
>
> A 49-year-old woman taken off a respirator and left to die after only five days in a coma, despite doctors admitting that they "did not know what was wrong with her." *Id.* at 27.

Beyond the specific examples, the Congressional record contained a plethora of evidence of other forms of abuse. The unnecessary use of restraints, seclusion, and forcible sedation was common. *Id.* at 87. In one hospital, the escape of a single resident caused the hospital to confine all other residents to their rooms involuntarily. *Id.* at 88. For eight months, other institutionalized individuals were denied any access to fresh air or exercise. *Id.*

In response to these hearings and the Senate staff report, Congress enacted the PAIMI Act. In addition to expanding the DD Act to cover individuals living with mental illness, Congress also increased the P&As' powers. For example, P&As were given authority to bring actions in the name of particular individuals, and given access to records of individuals with mental illness, as well as to individuals themselves. *Id.* § 10805(a)(3)-(4). Later, through the Children's Health Act of 2000, Congress expanded the PAIMI Act to cover individuals with

mental illness living in the community, including in their own homes. Pub. L. No. 106-310, codified at 42 U.S.C. § 10802(4)(B)(ii).

III. THE P&AS' FEDERAL RIGHT OF ACCESS TO INFORMATION IS CRITICAL TO THEIR MISSION

Today, every state and territory has a P&A, which is empowered to act pursuant to the DD and PAIMI Acts. *See* S. Rep. No. 100-454, at 3 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3217, 3219. Congress expressly allowed states to set up P&As as private, non-profit entities or state entities but directed that each P&A be independently governed. 42 U.S.C. § 10805(c). The majority of P&As are non-profit organizations. Eight state and two territorial P&As are independent state agencies.[3] Regardless of their structure, however, the funding and the decision-making of the P&A remain independent. In particular, each P&A is required to be "independent of any agency in the State which provides treatment or services." 42 U.S.C. §§ 10805(a)(2), 15043(a)(2).

In fulfilling their legislative mandate to represent individuals with disabilities, P&As carry out a multitude of functions, for which they have been praised as having "a whistleblower, ombudsman, watchdog, advocacy, and 'private attorney general' role." *Ind. Prot. & Advocacy Servs. Admin. v. Ind. Family & Soc. Servs.*, 603 F.3d 365, 383 (7th Cir. 2010) (Posner, J., concurring) *petition*

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[3] The states and territories with state agency P&As are Alabama, American Samoa, Connecticut, Indiana, Kentucky, New York, North Dakota, Ohio, Puerto Rico, and Virginia.

for cert. filed, 73 U.S.L.W. 3063 (U.S. July 21, 2010)(No. 10-131). Thus, P&As are comprised of a small staff of specially trained and highly dedicated lawyers, social workers, and advocates.

Under the DD Act and the PAIMI Act, one principal function of P&As is to "investigate incidents of abuse and neglect...if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 15043(a)(2)(B); *see also* 42 U.S.C. § 10805(a)(1)(A). Thus, a P&A's first task is to be aware of any abuse or neglect that is occurring at facilities for individuals with mental illnesses and developmental disabilities. A P&A might discover such abuse or neglect of the safety or rights of residents from monitoring facilities for compliance, 45 C.F.R. § 1386.22(g)(2); 42 C.F.R. § 51.42(c)(2), from its review of regular incident reports from facilities, *see, e.g.*, *Arizona Center for Disability Law v. Allen*, 197 F.R.D. 689 (D. Ariz. 2000), from an anonymous or identified tip, *see, e.g.*, *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 894 F. Supp. 424 (M.D. Ala. 1995), *aff'd*, 97 F.3d 492 (11th Cir. 1996), from friends or family of individuals in facilities, *see, e.g.*, *Disability Rights Wisconsin, Inc. v. Wisconsin Department of Public Instruction*, 463 F.3d 719 (7th Cir. 2006), directly from clients themselves, *see, e.g.*, *Advocacy Center v. Stalder*, 128 F. Supp. 2d 358, 365 (M.D. La. 1999), or even from newspaper articles or press reports, *see, e.g.*, *Office of Protection and Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303 (D. Conn. 2003). After receiving reports of abuse or

neglect, a P&A must determine whether there is probable cause for a more thorough investigation. *See, e.g.*, 42 U.S.C. §§ 10805(a)(1)(A), 15043(a)(2)(B); Conduct of Protection and Advocacy Activities, 42 C.F.R. § 51.31; Access to Records, Facilities and Individuals with Developmental Disabilities, 45 C.F.R. § 1386.22.

Investigations by P&As could not be effective without access to the information and individuals that are under the control of the facilities where any such abuse and neglect occurs. There is often no alternative source of information. As a result, if the P&A determines that there is probable cause to believe that abuse or neglect has occurred, it "shall" have a broad right of access to "all records," 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I), (J), individuals with developmental disabilities, *see id.* § 15043(a)(2)(H), and facilities, *id.* § 10805(a)(3), that are relevant to an investigation. As the Eleventh Circuit has explained, access to the records and to the individuals at the facility is essential to conducting an investigation. *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497 (11th Cir. 1996) (P&As require "broad access to records, facilities, and residents to ensure that [their] mandates can be effectively pursued."); *see also Protection and Advocacy for Mentally Ill Individuals Act, (P.L. 99-319): Hearing Before the Subcomm. on the Handicapped Comm. of the S. Comm. on Labor & Human Resources*, 100th Cong. 90 (1988) (statement of Eleanor S. Kohn, Vice President, National Mental Health Association) ("Access to facilities, residents, and their records is

essential if the P&As are to fully serve the needs of their clients.").

The information to which P&As need access includes medical records, which are critical for a P&A to perform its investigative function. Court after court has endorsed the proposition that without sufficient access to records, a P&A is incapable of fulfilling its statutory obligations. *See Ala. Disabilities Advocacy Program,* 894 F. Supp. at 429, ("The authority to investigate would mean nothing and advocacy in the form of investigation would be ineffective without access to records."); *Robbins v. Budke*, 739 F. Supp. 1479, 1488 (D.N.M. 1990) (mem.) ("Access to patient records is necessary for P & A to serve its clients, evaluate its clients' concerns, and determine whether a client has a legal claim."). Indeed, courts have found that the deprivation of such records by itself is enough to constitute irreparable harm to the P&A, such that the P&A is entitled to preliminary or permanent injunctive relief against state policies that deny access to records. *See, e.g., Wis. Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1051-52 (E.D. Wis. 2001); *Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs, L.L.C.*, 152 F. Supp. 2d 1150, 1173 (N.D. Iowa 2001); *Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 364, 365 (M.D. La. 1999); *Robbins*, 739 F. Supp. at 1488.[4]

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[4] Several circuit courts have also defined "records" broadly to encompass "peer review records," in addition to the more common "incident reports." *E.g., Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d

P&As also require access to individuals with disabilities or mental illness and the locations where they receive services, regardless of whether they live in institutions or community settings. One court has described that "central to the concept of authority to investigate is the ability to interview witnesses." *Miss. Prot. & Advocacy Sys., Inc. v. Cotten*, Civ. A. J87-0503(L), 1989 WL 224953, at *9 (S.D. Miss. Aug. 7, 1989), *aff'd*, 929 F.2d 1054 (5th Cir. 1991). It explained that "[o]nly by frequent personal contacts with residents, out of the presence of . . . staff, can [a P&A] effectively carry out its mission of pursuing remedies to protect the rights of [clients] and of providing the necessary information to them." *Id.* (footnote omitted). Another court concluded that a P&A's need for unmediated access to patients trumped the right of a patient's "legal representative . . . to prevent, be present during, or to terminate an interview." *Iowa Prot. & Advocacy Servs., Inc.*, 152 F. Supp. 2d at 1171. Thus, federal regulations give P&As broad access to residents and facilities:

> The P & A system shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority shall include the opportunity to interview any facility service recipient, employee, or other person, including the person thought to be the victim of such abuse, who might be reasonably

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119 (2d Cir. 2006); *Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000).

> believed by the system to have knowledge of the incident under investigation.

42 C.F.R. § 51.42(b); *see also Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 240-42 (2d Cir. 2006) (Sotomayor, J.) (finding that DD Act and PAIMI Act required access to state-run schools as well as residential institutions).

Moreover, in order to fulfill their statutory obligations, P&As must not only have access to records, individuals with disabilities, and the locations where they receive services, but they must also receive *prompt* access. *See* Melissa Bowman, Note, *Open Debate Over Closed Doors The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 Ky. L.J. 955, 965 (1997) ("When P&As are denied timely access to information, their ability to promptly investigate suspected abuse and neglect is greatly diminished. This interference with the investigative process allows 'facilities the time to conceal evidence, change medical records, coordinate stories among witnesses and/or impose a code of silence upon staff.'")(citation omitted). Under a 2000 amendment to the DD Act, Congress expressed its clear intent that P&As should be able to act quickly by requiring institutions to produce requested records within three business days of a P&A system's request, and to provide "immediate access" to records in cases involving the death of, or immediate danger to, an individual with developmental disabilities. 42 U.S.C. § 10543(a)(2)(J).

As a result, courts have recognized that mere delays in access constitute irreparable harm to the agency. *See Advocacy Ctr.*, 128 F. Supp. 2d at 364 ("Prompt access to records is necessary . . . . [T]he defendants maintain that, under state law and departmental policy, the Advocacy Center needs a court order. However, it cannot be disputed that the delay in getting a court order frustrates the goal of the PAMII Act."); *Robbins*, 739 F. Supp. at 1488 (holding that "[t]imely access to records is essential for effective communication" and that delays may "preclude[] P&A from evaluating and acting on a patient's concerns in a timely manner" and "prevent P&A from acting within prescribed deadlines or may cause a violation of rights to go unaddressed until it is too late to remedy").

P&As have used their access to information in a myriad of innovative ways to benefit individuals with disabilities. P&As have compiled information into databases, allowing them to identify facilities that show a pattern of abuse or neglect. They have sent reports to facilities, drawing attention to unacceptable practices and policies and making recommendations as to changes the facilities should make. They have issued public reports to expose abuse and neglect to the general public and policy makers. And as a last resort, when absolutely necessary, they also can use the information as the basis for litigation on behalf of their clients.[5] Or, alternatively, they can share information with other

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[5] P&As are encouraged to engage in alternative dispute resolution before filing any litigation. 42 C.F.R. § 51.32.

agencies, like the Department of Justice, which may have an interest in litigation in support of individuals with disabilities. Here again, the threat of litigation has often been enough to prompt facilities to adopt P&A recommendations, such that actual litigation was unnecessary.

These strategies have dramatically improved conditions in facilities for individuals with disabilities throughout the country. To list just a few recent examples in states with public agency P&As:

> In Indiana, the P&A recently used its access authority to investigate the use of restraints that physically injured a resident of a child care institution serving children with disabilities. Records obtained by the P&A using that authority included client clinical records, facility policies and the facility's internal investigatory report. As a result of the P&A's advocacy, the provider changed its practice concerning the use of restraints, adopted a non-physical intervention approach that focuses on behavioral management and problem solving, enhanced its current video recording equipment for better monitoring of common areas and when restraint and seclusion was used, and increased its documentation requirements.
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> Also in Indiana, the P&A investigated the death of an individual who had resided in a facility for individuals with disabilities and determined that the death had been caused by

neglect. The P&A used its access authority to get access to the client's medical records, staffing schedules, bed-check records, the facility's internal investigation report, and to get access to the facility, where a witness had observed the night staff sleeping. As a result of that advocacy, the state social services agency developed a mortality review committee, increased Medicaid waiver rates based on individual client needs, developed a written plan to follow when closing institutions, required inspections of all homes before individuals with disabilities moved in, and hired nineteen field workers to assess the quality of life in community homes and to respond to complaints.

In Kentucky, the P&A has repeatedly used access authority in investigating the deaths of individuals in state institutions, including an individual with a severe seizure disorder who drowned after being left unattended for ninety minutes in a bathtub and another who died after being placed in mechanical restraints because he insisted on watching television after hours.

In Connecticut, the P&A used access authority won in *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education*, 464 F.3d 229, 240-42 (2d Cir. 2006) to gain access to state schools for students with diagnosed emotional disturbances who were being regularly

restrained. Using that access authority, the P&A gained entrance to the school and the right to speak with the students. A report issued which resulted in the closing of the school. In 2010, the P&A issued a second, follow-up report, again using its access authority. As a result of this report the district has decided to send the children to different schools that are better suited for them.

IV. In Order to Gain Access to Information, P&As Often Require Judicial Equitable Relief

Unfortunately, requests made by both non-profit and independent state entity P&As for access to information and witnesses are often delayed or outright denied by state-operated facilities. *Miss. Prot. & Advocacy Sys., Inc.*, 1989 WL 224953; *Mich. Prot. & Advocacy Servs., Inc. v. Miller*, 849 F. Supp. 1202 (W.D. Mich. 1994); *Alabama Disabilities Advocacy Program*, 894 F. Supp. 424; *Office of Prot. & Advocacy for Persons with Disabilities*, 266 F. Supp. 2d 303. For a P&A facing a recalcitrant facility, often the only effective recourse is to invoke the threat of future litigation, buttressed by past court victories in similar access disputes. P&As have found that this threat is frequently both necessary and sufficient to prompt facilities to respond to requests expeditiously.

For example, in *Alabama Disabilities Advocacy Program*, a P&A sought medical records for two people who had died of respiratory failure in a state institution. The P&A sought the medical information after an anonymous tip, but the agency tried to

forestall investigation. The court required release of the records, explaining that even if federal law did not explicitly authorize P&As to have broad access to records, which it did, "a strong argument could be made that the Advocacy Program would be entitled to all information necessary to investigate incidents of abuse and neglect . . . ." 894 F. Supp. at 429.

Similarly, in *Advocacy Center,* the state P&A brought an action to compel the release of mental health records of an inmate of a state correctional center who claimed that his new physician had taken him off his medication, and his condition was deteriorating. The P&A requested the records on multiple occasions, but the facility refused to release the records except after an in-camera inspection by a court. 128 F. Supp. 2d at 361. The court concluded that forcing the P&A to go to court every time it needed to see medical records would "impede its ability to investigate a claim." *Id.* at 367. Thus, it compelled the disclosure of the requested records and granted a permanent injunction, invalidating the prison's policy of requiring in-camera review prior to record delivery. *Id.* at 368.

Finally, in *Mississippi Protection & Advocacy System,* the state P&A brought a legal challenge to a state hospital's policy that restricted the P&A's access to residents with whom it did not have a signed retainer agreement. 1989 WL 224953, at *9. A P&A attorney had been visiting the facility to investigate allegations of abuse. Rather than cooperating with the investigation, the facility chose to restrict the representative's access and to

encourage residents not to meet with him. The district court granted the P&A's requested injunction against the policy. In affirming the injunction, the Fifth Circuit explained that the DD Act

> [N]ot only described the range of services to be provided by the protection and advocacy systems, it also states that the systems "must have the authority" to perform these services. The state cannot satisfy the requirements . . . by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority. Defendants' restrictive practices have reduced [the P&As] authority to the point that it can offer [its clients] only a fraction of the services to which they are entitled.

Miss. Prot. & Advocacy Sys., Inc. v. Cotten, 929 F.2d 1054, 1059 (5th Cir. 1991).

Thus, case after case shows that court orders will sometimes be necessary to ensure that state-run institutions comply with federal law and to provide the oversight that Congress correctly determined was critical to ensuring basic protection for individuals living with disabilities.

V. ALL PROTECTION AND ADVOCACY ORGANIZATIONS MUST BE ABLE TO SEEK EQUITABLE REMEDIES AGAINST STATE AGENCIES IN COURT.

In determining that sovereign immunity precluded the suit by the Virginia Office of

Protection and Advocacy, the Fourth Circuit failed to appreciate the extent to which state-agency P&As are independent, and therefore that a court battle between a P&A and a state-run institution is not an "intramural" dispute. It also created a two-tier P&A system under which private non-profit P&As will have powers that state agency P&As lack. In doing so, the decision threatens to undo years of progress by P&As across the country.

A. P&As Are Independent of State Influence.

Congress specifically designed the P&A system to be independent of state influence because it knew that disputes between the P&As and state agencies were not only inevitable – due to state ownership and operation of many of the facilities where there were allegations of abuse and neglect – but also were necessary to ensure that P&As would offer adequate protection, without any conflict of interest, to persons with mental illnesses and developmental disabilities.

Ever since the DD Act, federal law has required that a state's P&A system must be independent from any other state agency that "provides treatment, services or habilitation to individuals with developmental disabilities." 42 U.S.C. § 15043(a)(2)(G); *see also id.* § 10805(a)(2) (requiring independence from agencies providing services for individuals with mental illnesses). Congress viewed this separation as necessary due to the fact that

> [T]here is an inherent conflict in the role a state must play in delivering services and administering programs for persons with

> developmental disabilities and in protecting the human and legal rights of such persons. The Committee also believes that it is most important to distinguish between these two roles in light of the nature and the problems confronting such persons who are not able to adequately protect their own rights.

S. Rep. 94-160, at 37. Indeed, a contemporary commentator described that in the first DD Act, with respect to P&A systems, "the only concrete requirement set out in the legislative history was the need for the P&A system to be independent . . . ." *See* James Stearns, *An Overview of the Genesis of Section 113 Advocacy Agencies, in, Protection and Advocacy Systems for the Developmentally Disabled* 2, 2-3 (Gary Clarke & James Stearns, eds., 1977).

In 1976, the Developmental Disabilities Office published interim guidelines to assist the states in implementing the Act. The guidelines reiterated Congress's requirement that the "designated P&A . . . must be independent . . . ." The Guidelines explained that in this regard "all possibility of conflict of interest must be avoided, and freedom of access to all remedies must be assured." Developmental Disabilities Office, DHEW, *Interim Guidelines for Development and Implementation of a System for Protection of the Individual Rights of and Advocacy for Persons with Developmental Disabilities* 2(b) (1976), *reprinted in* Stearns, *supra*, app. B, at 35.

The issue of P&A independence was revisited in 1981, when amendments to the DD Act were first

considered. Based on the early experience of the state P&As, one expert emphasized the critical importance of independence:

> Finally, I would like to mention a provision which I would not like to see substantially revised. I refer to the requirement for independent protection and advocacy systems in each participating state (Section 113). It is clear that such systems cannot survive without the required independence in both funding and authority.
>
> . . .
>
> The fact that some state agencies may be uncomfortable when challenged by one of these Protection and Advocacy Systems should not be a surprise to you. It was this Committee's dismay and dissatisfaction with the inability of state agencies to police themselves that brought about your mandate that Protection and Advocacy Systems be created.

Bill of Rights Act, 1981: Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources, 97th Cong. 38-39 (1981) (statement of Elizabeth Boggs, Member of New Jersey Council on Developmental Disabilities and the National Council of the Handicapped).

Accordingly, even after multiple amendments and reauthorizations, the DD and PAIMI Acts still require that all P&As act independently. *See Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373 (describing

state P&A system as "independent of the governor to a degree that is unusual and perhaps unique"). The federal government provides substantial funding for P&As. A governor may appoint "not more than 1/3 of the members of the governing board" of a P&A system. 42 U.S.C. § 15044(a)(2). States are prohibited from imposing "hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system . . . or would prevent the system from carrying out the functions of the system . . . ." *Id.* § 15043(a)(2)(K). Finally, state P&A systems must report to the federal government. *Id.* § 10805(a)(7); § 15044(e). These features led the Seventh Circuit to describe P&A systems as "closer to being . . . specialized agent[s] of the federal government . . . than [they are] to being ... ordinary state agenc[ies]." *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373; *see also id.* at 387 (Posner, J. concurring) (describing P&As as "state entit[ies] in name only" and as "agent[s] of the *federal* government" when in suits against states).

By guaranteeing that P&As would be independent of state influence, Congress ensured that a lawsuit brought by a public P&A against a state-operated facility would not be an "intramural" state dispute. The concern that federal courts should not intervene in such disputes, which motivated the Fourth Circuit's holding below, *Virginia v. Reinhard*, 568 F.3d 110, 119-20, 123 (4th Cir. 2009), is therefore misplaced.

B. Private P&As Do Not Have Different Powers than State Agency P&As.

Although Congress permitted states to designate either a public or a private entity for its P&A system, 42 U.S.C. §§ 10805(c)(1)(B), 15044(a), nothing in the statutory text or in the legislative or administrative history of the P&A system indicates that Congress intended that decision also to give states the choice between amenability to and immunity from suits. To the contrary, the history shows that the choice was structural, not substantive.

The legislative histories of the DD Act and the PAIMI Act do not expressly state why states might choose to establish P&As as either non-profit agencies or independent state entities. *See Ind. Prot. & Advocacy Servs.*, 603 F.3d at 387 (Posner, J. concurring). It seems likely, however, especially given the relatively small budgets provided to the first P&As, that in providing a choice Congress wanted to create a system of innovation in which states could experiment with systems that best met their needs. Stearns, *supra*, at 3. The early regulations implementing the system emphasized the need for preserving "flexibility." Developmental Disabilities Programs, 42 Fed. Reg. 5272, 5276 (Jan. 27, 1977) ("[U]ntil more experience is available in this program, it is best to allow the States as much flexibility as possible in implementing their protection and advocacy systems."). At least initially, that result was achieved. U.S. Gen. Accounting Office, GAO-03-1044, Protection and

Advocacy Agencies: Involvement in Deinstitutionalization Lawsuits on Behalf of Individuals with Developmental Disabilities, at 6-7 (2003) (discussing diversity of P&A structures). Neither at the time, however, nor in subsequent evaluations of the competing models, did anyone suggest that one advantage or disadvantage of public P&As was that they might be barred from seeking records from state agencies on sovereign immunity grounds. *See e.g.*, Bowman, *supra*, 85 Ky. L.J. at 990. Ironically, the assumption in the literature appears to be that one of the primary benefits of adopting a public P&A system is that they are *more* effective at obtaining information than private P&As. *Id.*

That Congress did not intend to permit states to immunize themselves from suit is apparent from the statutory mandate that P&As be independent. It is also apparent from the fact that Congress provided indistinguishable litigation capacities to public and private P&As even though its emphasis on flexibility ensured that P&As in individual states might adopt different enforcement strategies. A structural reading of the statutes compels this conclusion. Neither the DD Act nor the PAIMI Act differentiates between public and private P&As in terms of their abilities to pursue administrative or legal actions. *See, e.g.*, 42 U.S.C. §§ 10805(c)(1)(B), 15044(a). But all P&As "shall" have access to the records of individuals with disabilities, *id.* §§ 10805(a)(4), 15043(a)(2)(I), and facilities, *id.* § 10805(a)(3); authority to investigate potential abuse or neglect, *id.* §§ 10805(a)(1)(A), 15043(a)(2)(B); and the ability

to pursue administrative and legal remedies, *id.* §§ 10805(a)(1)(B), 15043(a)(2)(A)(i). It is forced and unnatural to construe the statutes as imposing uniform obligations on P&As while at the same time giving states the ability to imbue them with vastly different structural capacities to fulfill those obligations. The Seventh Circuit, sitting *en banc*, referred to such a reading of the statute as "unfair" and "strange." *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373; *see also id.* at 387 (Posner, J. concurring).

Moreover, the Seventh Circuit's holding that the DD and PAIMI Acts preclude state-by-state variation is hardly novel. Several circuit courts have been presented with the question of whether a P&A's right to access "records" includes "peer review records" as well as individual records in instances when a state legislature had enacted a law prohibiting the use of peer review records in discovery or civil litigation.[6] As then-Judge Alito found,

> PAMII requires that groups such as PP&A be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language.

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[6] These cases are discussed at greater length, *infra*.

Pa. Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423, 428 (3d Cir. 2000).

The provisions governing how and when a state may redesignate its P&A (change its structure from a state entity to a nonprofit or vice versa) underscore this conclusion. A state may not redesignate its P&A system absent "good cause." 42 U.S.C. § 15043(a)(4)(A). The state must give notice of the proposed redesignation, allow the P&A system to respond, provide for a period of public comment, and permit the P&A to appeal to the federal government. *Id.* § 15043(a)(4)(B)-(D). In discussing this "good cause" limitation, the Senate Committee explained that the aggressiveness of a P&A in pursing actions against a state or local government does not constitute good cause for the state to alter the form of the P&A: "good cause does not, in the Committee's view, mean aggressiveness—specifically litigation against any agency of state or local government—in pursuit of the designee's mandate to protect persons with developmental disabilities." S. Rep. No. 98-493, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4334, 4362. This admonition demonstrates the Committee's desire to protect the ability of P&As to sue. If a state cannot alter the form of a P&A based on its aggressiveness, it surely cannot avoid suit altogether simply by choosing a public P&A in the first place.

VI. The Ability of States to Assert Sovereign Immunity Would Eradicate the Ability of State Agency P&As To Carry Out Their Mandate

To allow states like Virginia to take federal funds under the DD and PAIMI Acts while essentially "opting-out" of the requirements on which Congress made those funds contingent would completely undermine the essential purposes of the P&A program—protection and advocacy for individuals with disabilities. Yet this is exactly what will happen if states are entitled to assert sovereign immunity against suits by public entity P&As for injunctive relief.

Rather than being independent, as Congress intended, public agency P&As would be entirely dependent on the whims of the states in obtaining access to both information and individuals with disabilities, as is required for them to fulfill their mandate. This Court has held that the Eleventh Amendment is equally applicable to suits in state courts and in federal courts. *See Alden v. Maine*, 527 U.S. 706 (1999). Accordingly, if the Eleventh Amendment bars public P&As from suing in federal court, a similar bar would apply in state courts. *See Ind. Prot. & Advocacy Servs.*, 603 F.3d at 374 ("[I]f the Eleventh Amendment prohibited IPAS from suing the defendants under the PAIMI Act in federal court, it would also prohibit IPAS from suing defendants under the PAIMI Act in state court."). Absent waiver, public agency P&As will be entirely unable to enforce federal law against state agencies.

Based on the assertion of counsel for Virginia, the Fourth Circuit suggested that VOPA may seek a mandamus in the Virginia Supreme Court. This is predicated on a provision in the Virginia Constitution permitting mandamus actions in the Virginia Supreme Court and an apparent interpretation of that provision as waiving sovereign immunity for such suits. Although counsel for Virginia may be correct that Virginia's Constitution waives sovereign immunity for mandamus actions, other states do not offer a similar alternative. *See, e.g., Ind. Prot. & Advocacy Servs.* 603 F.3d at 374 n.7 (noting that because a mandamus action would seek to enforce federal law, "the *Alden v. Maine* problem would remain."). Indeed, the state constitutions of other states with state P&As, such as Kentucky and Alabama, contain no similar waiver of sovereign immunity for mandamus actions. *See* Ky. Const. § 231 ("The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth."); Ala. Const., Art. I § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."); *see also Patterson v. Gladwin Corp.*, 835 So. 2d 137, 142 (Ala. 2002) ("The wall of immunity erected by § 14 is nearly impregnable."). As a result, P&As in those states may be completely barred from enforcing federal law against state agencies.

Even in states that waive sovereign immunity for a mandamus action, that option would be far less effective than a suit in federal court. First, even in Virginia, a writ of mandamus is an "extraordinary remedy" contingent on "judicial discretion."

Umstattd v. Centex Homes, G.P., 650 S.E.2d 527, 530 (Va. 2007). Second, a mandamus action in a state supreme court cannot address ongoing violations of federal law with anywhere near the alacrity with which a federal court can issue a preliminary injunction. Under the DD Act, Congress expressed its clear intent that P&As should be able to act quickly by requiring institutions to produce requested records within three business days of a P&A's request, and to provide "immediate access" to records in cases involving the death of, or immediate danger to, an individual with developmental disabilities or mental illness. 42 U.S.C. § 10543(a)(2)(J); *see also Ind. Prot. & Advocacy Servs.*, 603 F.3d at 374 n.7 ("Congress clearly intended the protection and advocacy systems – all of them – to be able to respond quickly to threats of imminent harm to their constituents."). Yet a mandamus action does not provide for temporary injunctive relief. As the Seventh Circuit recognized, there is no such thing as a "preliminary mandamus action." 603 F.3d at 374, n.7.

And even if states waive sovereign immunity for suits in state court, they may do so in a manner that significantly limits the enforcement power of the P&As. In some states, P&As may face a number of procedural hurdles that compromise their ability to enforce federal law. In New York, for example, a state agency obtains an automatic stay of an injunction simply by filing a notice of appeal. *See* N.Y. C.P.L.R. § 5519(a)(1). That home-field advantage simply cannot be reconciled with

Congress's intent that P&As be able to respond to problems quickly.

Moreover, federal courts have a broader geographic jurisdiction than state trial courts. Thus, a single suit brought by a P&A in federal court could resolve a number of statewide violations, while in state court it would have to file multiple suits across the State. Similarly, decisions of the federal courts of appeals establish precedent across a far broader geographic territory than decisions by state appellate courts. P&As forced to sue only in state courts will need to file more lawsuits, and therefore will require greater legal resources, simply to obtain the relief that federal law requires.

Lastly, as noted by the Seventh Circuit, it would be both "unfair" and "strange" to give any weight to a state's choice to set up a P&A as an independent state agency rather than a private not-for-profit entity. *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 373. To do so would enable a state to "use its own choice...as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens." *Id.* Congress did not intend that only private P&As have the power to sue, nor could Congress possibly have intended that states could avoid difficult investigations or inconvenient lawsuits simply by designating – or re-designating with good cause – their P&A as a state agency. The ruling below would potentially permit states to flout federal law and render P&As completely powerless to investigate and

address the sort of appalling conditions at state-run facilities that necessitated federal government intervention in the first place.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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